

Law and the State: a Philosophical Evaluation

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Abstract

This essay examines the aims and functions of law in the state. It investigates the ontological basis of law, the role of law in the polity, and suggests some ideas about law which if applied to the existing paradigm of law will make law humanistic instead of positivistic. As it pertains to the objectives and functions of law in the state, reference shall be made to schools of thought in jurisprudence such as the natural law theory, legal positivism, legal realism, sociological jurisprudentialism and ancestral law. The purpose will be to show how law has varied from epoch to epoch and from society to society. On the whole, law has evolved through four principal eras which include ancient, medieval, modern and contemporary. Law in the ancient period was metaphysical, moralistic and cultural. In the medieval period, law was teleological, theological and theocratic. And in the modern and contemporary periods, law assumed both constitutional and secular dimensions. The paper also makes distinction between philosophy of law and jurisprudence and this is done with a view to showing that law is not a sole priority of lawyers and judges, but a concern for intelligentsias who wish to express their views about how best law could be used to achieve social cohesion in the state.

Introduction

It is generally assumed that man is a socio-political animal, that man and society are mutually inextricable, and that no one can lead the life of the island (like the lonely Robinson Crusoe the ship-wrecked man trapped on an island). Such a world would simply be boring and meaningless. From the moment necessity endeared man to live beyond subsistence and evolve society, the questions have ever re-echoed: What is law? What is the role of law in the state? What are the rights and obligations of the citizens in the state? These rights and obligations vary from the intellectual, political, economic, judicial, to the freedom of expression, property ownership, equity and justice. However, the obligations and rights of the citizenry are actualized or negated according to the nature of law within a particular state.

The state is a personified abstraction. It often signifies the laws of the federation or a republic. It is in this sense that the state is said to have a geographical expression. A nation nonetheless refers to a people and the way they live (i.e. by their norms and customs). A nation state therefore, will include the people and the laws of the land by

which the people organize their affairs. It is in this sense that we speak of a polity and the principle of democracy. As man and the state are inseparable, so are law and the state inseparable. Akin Ibidapo-Obe makes this point when he states that “law and society are inextricably linked because law is the foundation upon which social organization is built”(Ibidapo-Obe, 1992: 3). This implies that law intermingles with other social institutions and also with other academic disciplines within a polity. It is in this sense that Akin Ibidapo-Obe further states that:

Law is the fountain head that nurtures, or is nurtured by other elements of social organization such as politics, economics, sociology, psychology and religion.... Kings and Princes, Chiefs and Priests, Bishops and Mullahs, Proletariat and Soldier and, indeed, any person or group of persons who hold(s) the reigns of power or governance over a group of people do(es) so on the basis of law. A lawfully authorized government rules by law in the same way as usurpers to power must resort to some form of law to gain legitimacy and control (p. 1).

G. Hay seems to be in agreement with the above assertion of Ibidapo-Obe when he states that the “command of the public force is entrusted to the judges in certain cases” (Hay, 1898-99: col. 195). A similar view is also espoused by Oliver. W. Holmes and J. C. Gray. Gray for instance, says that “every society or organized body of men must have a judge or judges to determine disputes.... The more civilized the society becomes, the more do the functions of a judge come to be exercised apart from other functions”(Gray, 1892-93: cols. 23-24). The foregoing assertion of Gray about law seems to suggest that law will best actualize its essence in a democratic society. It is against this line of thought that he further states that:

The law or the laws of a society are the rules in accordance with which the courts of that society determines cases and which therefore, are rules by which members of that society are to govern themselves; and the circumstance which distinguishes these rules from other rules for conduct, and which makes them “the law”, is the fact that the courts do act upon them. It is not that they are more likely to be obeyed than other rules(col.. 24).

Reiterating the above submission of Gray, Hay goes ahead to state that “de facto, the orders come from the courts, from the judicial, not from the executive departments” (col. 195). By implication, the judiciary is the overseer and regulator of law in a democratic

society and for this reason it (the judiciary) must ensure that the law of the land is just in the eyes of the public. Once the public perceive that governance operates on the rule of law, the government of the land becomes easily acceptable. Hay then submits as follows:

The law, therefore, may be described as substantially those rules which are used by the courts in determining when and to what extent the public force shall be used against individuals in time of peace (*Ibid*).

The assertions of Hay and Gray buttress the point that the efficacy of law in any polity is best realized in the law courts through the judges. These views of Hay and Gray represent the position of the American Sociological Jurisprudentialists. There are of course other perspectives to law all of which aim at proffering ideas about what should be the nature, structure and function of law in the state. Needless to say, the delineation of the perspectives to law in relation to the nature, structure and function of law in the state happens to be of concern to philosophy of law and jurisprudence.

But what really is the difference between philosophy of law and jurisprudence? We can regard the former as the searchlight for elucidating the aims, functions and the relationship between law and jurisprudence. Philosophy is the logic behind law, while jurisprudence is the lubricant of law. Through law, jurisprudence and philosophy intermingle, but the three are different in perspectives and functions. Philosophy of law belongs in the discipline of philosophy and its aims and functions include to critically evaluate such ontological questions as: Why does the state or law exist? What are the functions and the aims of law in the state? What is the purpose of jurisprudence and how could its concepts and theories be thoroughly clarified to meet its set objectives? Jurisprudence on the other hand belongs in the discipline of law and deals with the content of the law, that is, the definition of theories and concepts of law. “The jurist considers the structure or function of law, the philosopher its underlying principles and causes. The former’s interest is on the content of the law, the later on the spirit or being of the law” (Berolzheimer, 1964, 3). Philosophy through ethics bequeaths to law the task of ensuring that the dream of humans to attain the universal pedestal of a well rounded live guided by reason (in every society) is accomplished. Ethics as a normative study describes and prescribes yardsticks by which human conduct can be adjudged as good or

bad, wrong or right, just or unjust. At the level of meta-ethics, theories in and the language of ethics are scrutinized. But this goal of ethics to pursue the ideal life is not accomplishable without law. Law then becomes that efficacious way of bringing into reality the lofty dream of the ethical man to live in an organized society where there are balance and cohesion achievable through rules and regulations. The onus now falls on philosophy of law and on jurisprudence to marshal out ways by which the ideals of ethics can be accomplished through law.

In theory, jurisprudence looks universal (as it pertains to the analysis of concepts), but in practice, it seems limited by the interpretations of law within a polity. Since jurisprudence is man's thoughts about himself and about the society in which he lives, it means that jurisprudence is connected to other fields of knowledge such as the social sciences, the sciences and the humanities. "All these sources aggregate to form the philosophical and political valuations from which a legal theory is built up. Historically, it is the genealogy of ideas, it is an eclectic discipline which encapsulates the idea of human cultural existence, the protagonists of it...include the lawyers, churchmen, historians, anthropologists and so on (Ibidapo-Obe, 4). Both philosophy of law and jurisprudence are however, parasitic to other disciplines all of which combine to form the ideological orientation behind law. Consequently, Ibidapo-Obe submits that: "Law takes its colour from ideas, from philosophy, or ideology. It is the philosophy, the theory or ideology upon which law is based that constitutes the province of jurisprudence"(p. 3).

The Ontological Basis of Law

More fundamental than the existence of law, are the reason(s) for which law exists. The factor(s) which necessitate the evolution of law and the purpose for which law exists is called the "ontological basis of law". At the core of the evolution and existence of law are basic issues such as "the nature of man," "man and the state," and "the purposes for which man and the state exist."

In *The Idea of Law* Dennis Lloyd enunciates the Semitic and Caucasian accounts of human nature fundamental to man's relationship with nature and his society. Whether

from the religious or secular point of view Semitic/Caucasian conception of man and society is that which stresses the negative nature of man and society. From the religious perspective, man is seen as a fallen angel, a being of vice who has to be saved by the intervention of God. From the secular point of view, philosophers such as Rousseau see man as an innocent being corrupted by society. Some other philosophers such as Thomas Hobbes see man as a lawless being that needs to be reformed by the draconian laws of the Leviathan. Thus, from the Western perspective, man is conceived as being either evil by nature or that society corrupts his innocent nature. It is thus for the sake of social harmony that the need arose for the evolution of penal laws to curtail and restrain the excesses of men.

In the African tradition, man and the state are conceived as symbiotically coexisting such that man discovers his creative purpose in nature as he explores the potentials of nature to improve his lot in his social setting. The purpose of man from this perspective is therefore cosmological and holistic in the sense that man and the cosmos are inseparably interlinked. The African conception of man and society is tripological in the sense that the “cosmic order” is replicated in the “social order”, the “social order” is replicated in the “self order” and vice versa. This way, “all forces become strengthened, the individual is seen in the light of the whole, in the same way as meaning, significance and value are seen in the light of the whole, all of which depend on the art of integration” (Anyanwu, 1981: 371). This explains the reason why the African penal laws and the conception of retribution consist of the processes of reconciliation and compromise.

On the contrary, traditional Western conception of man and the state is metaphysical and theocratic. The universe is seen as the handwork of the creative genius (God) who then appointed man the caretaker of his creation. By 15th century A.D., Baconian empiricism and Cartesian rationalism initiated a major change in the Western conception of legal science in the same way as the Kant’s categorical imperative (discoverable by human reason) changed western conception of human nature. The consequence of this revolution is that a lacuna was created between the private (subjective) and the public (objective) conceptions of man that in turn influenced the Western conception of law as it pertains to

property ownership. Now, beginning with social contract theorists such as Thomas Hobbes and legal positivists such as Jeremy Bentham and some other philosophers such as Hegel, absolute theories of law evolved which removed the emphasis of law from obligations to rights and separated law entirely from morality.

The result of this revolution is that both the cosmological and theocratic conceptions of man and the state were radicalized thereby increasing the need for the “rigours of a punitive system of law” (Lloyd, 1987: 14). It is in this sense that Dennis Lloyd states as follows:

The attempt to regard law as a natural necessity directed to restraining, in the only way possible, the evil instincts of man gave way to a new view of law as a means to rationalizing and directing the social side of man’s nature (p. 18).

The necessity for punitive measures of law brings to mind concepts such as power, authority, sanction, force or coercion. If indeed human nature is evil, it follows that man needs laws (in the form of sanctions) to reform his evil nature so that harmony and tranquility can be achieved in the society. To achieve this, the custodians of law in a state must learn the skill of balancing the dichotomy between obligations and rights. Obligations as duties and rights as depicting individual liberty have their bases in the philosophical foundations of determinism and indeterminism. The fundamental issue here borders on the fact whether within a socio-political context, man is free or determined in the performance of his actions. On this question alone, if opinions of the citizenry of a polity are sought, views would run riot.

Usually, legal injunctions serve the double role of imposing obligations as well as granting rights to the members of the state. It is this sense that Dworkin says that law confers, reforms and restrains. It is also in this sense that Jeremy Bentham states that:

Rights and obligations, though distinct and opposite in their nature, are simultaneous in their origin and inseparable in their existence ... the law cannot grant a benefit to one without imposing, at the same time, some burden upon another, or in other words, it is not possible to create a right in favour of one, except by creating a corresponding obligation imposed

on another. How confer upon me the right of property on a piece of land? By imposing upon others not to touch the produce. How confer upon me a right of command? By imposing upon a district, or a group of persons, the obligation to obey me (1957: 57).

Bentham defines rights and obligations thus:

Rights are in themselves advantages, benefits, for he who enjoins them whereas obligations on the contrary, are duties, charges onerous to him who ought to fulfill them (*Ibid.*).

Bentham therefore asserts that rights are good, while obligations are evil. He then goes ahead to advise that in the granting of rights cognition should be taken of the fact that the right conferred to do good also includes the right to do harm or evil. He also cautions that the legislator ought never to impose a burden except for the purpose of conferring a benefit of a clearly greater value. Perhaps, it is in agreement with this Bentham's line of thought that H. L. A. Hart submits as follows:

Primary rules imposes obligations and duties, Secondary rules confer powers and rights which facilitate the execution of a will (1977, col. 152).

Indeed, law and legal theories exist for the purpose of drawing up ways of ameliorating the divide between rights and obligations.

In *Democracy and Natural Law* Robert L. Calhoun explores what he calls "the nature and behaviour of man as a political animal" (1960: col. 40) in a democratic society. Calhoun sees man and his world as dynamic forces that continuously undergo the processes of change. For him, the understanding of human nature should provide a solid background for the proper functioning of law in the state. He defines man as follows:

- (i) a body and spirit in the evolution of creation and intentions
- (ii) A rational being that affects his environment positively and negatively and is in turn affected by his environment
- (iii) A sentient being that holds emotionally to his desires
- (iv) An anthropological being that builds tools
- (v) A cultural being that creates norms and customs for social harmony and religious orderliness
- (vi) A homo-politicus who creates ideologies, theories and devices laws for state organization

- (vii) A homo-theoreticus or intellectual being who seeks knowledge and acquires the know-how in order to discover and invent scientific and technological edifices (*Ibid.*).

To achieve his aims and aspirations, man has no option but to live in the society. It is for this purpose that the laws of the state confer rights and obligations to the citizens. But these rights and obligations serve as “limitation on the one hand and freedom on the other” (p. 43) in the sense that the rights and obligations so-called are regulated by sanctions. It is in this light that Calhoun sees the democratic society as the best form of state which can help man actualize his authentic self. Democracy, he says, is an “operating system and regulative idea’ in the sense that the ‘initiation and control’ needed for coercion or sanctions are embodied in the people which grants the room for ‘plurality of initiative’” (p. 33). Contrary to the classical school of thought which views authority in terms of coercion, prestige and emotional persuasions, Calhoun says that authority comes from a root word which original meaning is intended to enhance the one that is controlled (i.e. people of the state). to illustrate, the word *Augere* means to make greater, while *Auctor* refers to one who exercises that sort of productive, beneficent and stimulating control. *Auctoritas*, so understood, is meant to prompt into fuller life the person over whom authority is being exercised. Consequently, Calhoun submits that:

In existing democratic societies the rules for public behaviour and for political control are established and modified in the light of open discussions and by decision that seeks to reflect *majority will* with concern alike for the common good and for voluntary assent (p. 35).

Here, “majority will” must be distinguished from the “general will” of Rousseau. Rousseau’s general will is the submission of one’s civil initiative and control to the conferred authority of the “civil ruler”, who now wills for the people by his own initiative and control and determines the rights and obligations of the citizenry. Majority will on the other hand, is the collective participation of the people’s “plurality of initiative” in decision and policy making and dissemination. It is on this ground that Calhoun disagrees with A. P. d’Entreves’ assertion that Rousseau’ theory of “General will” marks the hallmark of democracy.

Law and the Structure of the State

Fundamental to the existence and sustenance of the state are factors such as legitimacy, stability, equity and justice. The efficient co-ordination of these factors within a state ensures the attainment of harmony and tranquility necessary for the progress and development of the state. Explaining how the state came into existence Plato says that:

A state arises out of the needs of mankind. No one is self-sufficing, But all of us have many wants and many persons have needs to supply them, one takes a helper for one purpose and another for another; and when the helpers and partners are gathered together in one habitation the body of inhabitants is termed a state (1935, 95).

On how the state came into existence Plato writes

The true creator of a state is necessity, which is the mother of our invention. The first and the greatest necessity is food, the second is dwelling, and the third is clothing (p.96).

Human needs in the state are numerous and most of the time, the way human beings aspire to achieve their various needs creates serious conflicts in the society. It is in the solemn resolution of such conflicts that we know a just system of law. The truth is that a just system of law should afford the citizens of the state equal opportunity to excel in whatever trade they aspire to or engage in. Consequently, it is expedient that the implementation of the stipulations of law, the custodians of law should take into reckoning the fact that a just system of law is one which takes into consideration the limitations of man. Having noted this they (custodians of law within a polity) should endeavour to devise ways of adequately ameliorating human excesses in the society without causing undue injury to the violator of law.

The issue of a just system of law further raises the question of the purpose and goal of law in the state. In whose interest is the law made? The state, the citizenry, or the leadership? Is law made to protect the weak or to serve the interest of the strong? Is it that right is might or that might is right? On what ground have the citizens the right to disagree with certain laws of the land? These and many other questions are necessary in the evaluation of the functions of law in the state in the sense that legitimacy can be

usurped and imposed upon the people. To ensure that everyone is equal before the law, certain mystique (system of norms) have been created around law with a view to enhancing the efficacy of law. They include the following:

- (i) Law is regarded as a social institution in which we sometimes speak of law in the abstract sense. Expressions as “the majesty of law”, “the justice of law” “equality of all before the law”, “the rule of law”, “Law, the common man’s hope” and so on are used to characterize law in the social context.
- (ii) There are “laws” or the “rules” in which process law comes into existence as expressed by its contents and the range of application.
- (iii) There is law as a peculiar source of certain rights, duties, powers and other relations among people. In this sense, law confers, regulates and restrains. It is in this latter sense that we say someone should be held responsible for damage on grounds of negligence, or that the law provides that a certain person has the right to leave his property to whoever the person so pleases. It is also in this third sense of law that we say that the ignorance of law is no excuse to flout the law, in which case, no man may profit from his own wrong doing.

Doubt, however, remains as to whether law cannot be perverted to profit the wrong doer or if law cannot sometimes be prejudiced as to legislate unfavourable conditions that will affect the citizens of the state adversely? There is no question as to the fact that may err, but whatever the law states or stipulates at a time, “that is the law” and ignorance of the law is no excuse to flout it. For law in whichever circumstance is more *de facto* than *de jure*.

The above submission notwithstanding, the point still remains that it will be injurious, if not damaging, for the citizens of the state (particularly, one which is a democracy) to perceive the law of the land as being coercive. To avoid such ugly situation, Leo Strauss enunciates the view that in order for man to attain his highest statute, he must live in the best kind of society most conducive to him. This best kind of society which inspires man to pursue after excellence, according to Leo Strauss, is called the *politeia* (1964: 135). Let’s hear from Strauss on this matter.

As a civil society, the *politeia* depicts the government of men as opposed to the mere administration of state affairs, it is the factual distribution of power within a community than what the constitutional law stipulates in regards to political power. However, the *politeia* as a legal phenomenon exists in a constitutional form (pp. 135-36).

The theory of *politeia* enunciated by Leo Strauss calls to mind Plato's "Ideal Polity", Marx's "Communist State", Augustine's "City of God", African "Communalism" and the Islamic "Uma" all of which sound utopian.

Utopian as the issue of an ideal state of affairs may sound, the fact remains that the engineering and re-engineering of the state through law to attain balance and cohesion is not be possible without the notion of the ideal state. Crucial to the existence of the state therefore, is the issue of legitimacy. By what process and in what manner was the leadership installed? Is it through a democratic process? Or is the leadership a group of usurpers who imposed their will upon the people? How would a regime react to individual discretion concerning state duties and citizen morality? These questions are central to the issue of legitimacy and for that matter the nature of law in the state. They are questions that are also of interest to schools of thought in philosophy of law and in jurisprudence.

Defending the Natural Law theory, Socrates identified "law and nature, and the just with the legal" (p. 106). His central concern is about how man can live a good or just life in the society. For Plato, the question of legitimacy follows from the issue of justice and justice is when reason governs the lower emotions in the same way as the philosopher King is supposed to be the ideal leader over the soldiers and artisans. Only then could justice be said to be obtainable in the society. Aristotle distinguished between "Natural Justice and Legal Justice". The first is a derivation from Natural Law and is universal in status, while the second is derived from the constitution of the state and is determined by the laws of the state. It is perhaps from this justice point of view that Aristotle justifies the institution of slavery. For the Sophists, The Natural Law is universal and all men are equal before the law. Any human law that contradicts Natural Law is illegitimate and unjust. The Stoics on their own part, see legitimacy and justice as derivations from *Logos* otherwise known the universal principle of reason.

According to d'Entreves, Natural justice for the Romans was based on the knowledge of the "know-how" (i.e. technical). They saw law as a matter of social engineering in which

legitimacy and justice were seen as obtainable from within the confines of the state following the laws of nature. Thus, they developed legal principles which the Roman jurists and magistrates saw as empirical principles of reason and justice rather than as deductions from universal reason. They developed three levels of idea of Natural Law as follows:

- (i) “ius gentium” as the embodiment of laws and usages found among peoples and representing good sense.
- (ii) “ius naturale” as the exercised creative function through the ius gentium.
- (iii) “ius civil” as the practical law of the state.

In the medieval era, legitimacy, justice and law were seen from the theological perspective or what d’Entreves calls the “ontological” approach to law. Thus, Thomas Aquinas, in his theory of Natural Law, espoused the view that should a person hold a secret that will set a polity into crises, such a person should withhold his findings no matter how important or factual such findings are. It does not matter if the regime is despotic. What Aquinas seems to be emphasizing is that the King is an embodiment of God and only God can so oust him. Similar kind of legal philosophy obtained in medieval Islam where propagation of the “divine rights of Kings” loomed large. The spiritual took control of the temporal. For Kings and Sultans to gain legitimacy, they had to seek the anointing of the Church or the Mosque. Justice, of course, was at the mercy of the despots. Two philosophers, Ibn Khaldun (1332-1406) and Nicholo Machiavelli (1469-1537), however held opposing views to the common belief of this period. Ibn Khaldun relayed the sociological flux (rise and fall) of the regimes of the Maghreb. He exposed the avarice of the regimes, their greed for naked power and their imposition of their will on the citizenry under the guise of divine justice. De-emphasizing the issue of divine justice, Ibn Khaldun goes ahead to describe the means by which leaders of medieval Islam imposed their will upon the people. According to him, two principles, *Asabiya* and *Mulk* are central to the organization of any polity. In his book *Kitab al Ibar* (Universal History), Ibn Khaldun explains that *asabiya* is the principle of collective discipline that a group or groups use for the obtainment of dominion or power (*mulk*). Whereas the *Malik* (King) relies on *asabiya* for support, *mulk* allows him the expression of his authority and power. In other words, “power is the basis of the state and the necessary instrument of

that restraining authority without which man cannot exist” (Rosenthal, 1958: 85). Machiavelli on his part, enunciated the psychological and moral behaviour of the ruler and the ruled. His aim was “to set objective laws from historical facts, and these laws are meant to direct and guide the ruler who wishes to perform efficiently in his political objectives” (Bah, 1989: 10). He shows how the principalities of Italy rallied for state power and exerted naked authority on their citizens. Since the Prince enthroned himself by means of conspiracy, he was pessimistic about the nature of men. Since men are evil by nature, the Prince is to combine the craftiness of the fox and the aggression of the lion in order to manipulate the selected men and the mass-men. His watchword was to legitimize his authority over the people, and in doing this, “he judges by results, looks to the end in order to justify his means” (p. 13).

Epicurus Lucretius, in his poem entitled *On The Nature Of Things*, had developed the State of Nature Theory. For him, “man had to evolve society in order to overcome the intimidating forces of nature and the fear and menace of wild beasts” (Leo Strauss, 111-112). Following the State of Nature Theory, the Social Contract Theorists shifted the emphasis of law and justice from obligations to natural rights. Their major task was to de-emphasize the divine rights of Kings that stressed obligation over rights. In place of this Social Contract Theorists propagated legislation by parliament that stressed natural rights over obligations. In opposition to this view of Social Contract Theorists however, stood the Hegelian conception of law which strips the citizens of their rights. Hegel in his *Philosophy of Right* portrays the state as the manifestation of the Absolute Spirit. He goes ahead to say that the will of the Absolute Spirit is the will of the state which is embodied in the personality of the leader. The result is that the Kings of the Reformation, wielded absolute powers, to the extent that the: “Religion of the King was the religion of the state (*cuis regio, enes religio*) or the boast of Louis XIV, the King of France. The state? I am the state. The King becomes the embodiment of the sovereignty of the state” (Ajayi, 1992: 14).

The advent of legal positivism gave law a totally new perspective. Law was removed from its rationalistic and idealistic bases to the empirical, the basis of which is the natural

sciences. Bentham, the founder of the principle of utilitarianism and the theory of legal positivism sought to make law scientific like the Newtonian science. He hoped that his *hedonic calculus* would do for law the magic that *Newtonian Calculus* did for physics and science. We can therefore see that the theory of legal positivism was influenced by radical events that took place in modern Europe which include the following:

- (i) The emphasis on natural rights by the Social Contract Theorists.
- (ii) Thomas Hobbes' definition of law as "the command of the sovereign".
- (iii) The American and French revolutions of 1779 and 1879 which stressed the civil rights of the citizenry in the concepts "Freedom, Liberty and Enfranchisement".
- (iv) Hegel's philosophy of right and August Comte's positivism and;
- (v) David Hume's assertion that the value statements cannot be derived from the statements of facts, that is, there is no connection between the "isness" and the "oughtness" of statements.

Little wonder then, legal positivism enunciates the imperative theory of law which separates morality from law. And it is based on this imperative theory of law, that Bentham says that law whether good or bad necessarily involves a "mischief". As David Lyons puts it, "imperativism recognizes only two types of law, command and prohibitions, by which case, a law is both restrictive and permissive based on the fact that a law confers and subordinates both rights and obligations" (1973: 110). What this assertion amounts to is that whatever legal system is in operation and however iniquitous it (such legal system) may appear, there is an unconditional obligation to obey it. This notion of law, to say the least, is problematic in the sense that the impression is created that obedience to the law, no matter how unjust, means that the law is acceptable to the people.

Legal positivism seems to be "value neutral" in that it removes "conscience" from law. It is perhaps for this reason that totalitarian regimes such as those of Nazi Germany and Hitler, Fascist Italy and Benito Mussolini, Communist Soviet Union and Stalin, became the norm of contemporary Europe. These regimes combine despotic measures such as - intimidation, indoctrination, demagoguery, propaganda and the destruction of the opposing parties; all of which are means of coercion, to force their wills upon the people. Thus, given the provisions of legal positivism, the atrocities of military and despotic

regimes as well as the obnoxious rule of the colonial masters in Africa are all proper. In this sense, the annulment of the June 12 elections of 1993 in Nigeria is right and both the interim government of Shonekan and the despotic regime of Abacha are legitimate. As such, when the Civil Rights activists such as Gani Fawehinmi say that Abacha's government is illegal, they are on the wrong unless they speak from the Natural Law viewpoint. And it is only within this confine that the appeal of Modhood Abiola (the winner of the June 12 elections) against the annulment of elections holds ground. The point we make here will be clearer if we attempt to summarize the stipulations of legal positivism which are as follows:

- (i) Imperatively, law is the command of the sovereign backed by sanctions.
- (ii) Analyticity sees law as an all-inclusive system that requires nothing extra-judicial to it. Here the truth about law and its development are sought within the confines of law.
- (iii) Positivism separates law from morality and imposes law over morality, that is, what the law says is that which is moral. Here, the authenticity in law is the "is" and not the "ought".
- (iv) Kelsen's pure theory of law posits "norm" (the normative theory of law) as the basis of law and the limit within which command is permitted or authorized. Yet this normative theory of law remains on the realm of imperativism because only the legal norm (as opposed to the moral norm) carries with it, the penalty of sanctions and the force of coercion. We note here that Kelsen's attempt to dress legal positivism in a new cloth fails because law still remains the command of the sovereign, since the norm itself is defined by the sovereign (whatever form of regime it is).

In all, the doctrine of legal positivism is out to achieve stability, peace, unity and security within the polity, but its basis for this is amorphous in that it assumes that the ideal thing about law is coercion and sanction. This implies that justice is the will of the strong.

In *The Ontological Structure of Law*, Arthur Kaufman (1963) tries to marry the idealistic and positivistic perspectives to law. He says that both perspectives represent sectarian and monistic viewpoints about law. He argues that the fundamental question about law concerns "what the general constituent elements of law really are" (col. 83), which in turn derives from the broader question "what are the constituent elements of being" (*Ibid.*)? These fundamental questions when combined, says Kaufman, constitute the basis for "justice and certainty" as well as 'law and power' which technically has been designated

‘the ontological structure of law’” (*Ibid.*). Kaufman goes further to say that both idealism and positivism have missed the point about law. According to him:

Whereas positivism is hinged on the existential, seeks for certainty and sees the validity of the norm in terms of its effectiveness; idealistic notion of law is hinged on the essential and sees law only from the angle of justice, substantive content and material validity. Positivism seeks to refute and free law from the absolute values of idealism, idealism on the other hand challenges positivism to show that laws are not possible without values” (*Ibid.*).

The result is that law has been rendered esoteric and sterile and it is for this reason that Kaufman advocates that the “one-sided monistic conception of law must give way to a dualistic one, or more exactly, to a plural conception of law” (*Ibid.*)

The above view of Kaufman seems to be reiterated by American Sociological Jurisprudentialists who maintain that the legislation of law should be based on Natural Law, while its enforcement should take a positivistic perspective. For instance, Joseph O’Meara holds the view that “law is a process of decision making rather than the agglomeration of rules, it is a process in which the judge performs not a mechanical but a creative function” (1960: col. 103). According to him, in this whole process of decision making the role of natural law is “to call in question the moral authority of rule when it exceeds the limit of reason” (col. 84). John C. Gray on the other hand, classifies law into “commands given by legislative organs of the state, whose judicial organ is the court and precedents” (1892-93: col. 28) by which the court rules its judgments. In legislating law, “Parliament, Congress, Cortes and Assembly” (col. 29) debate the law which is to be passed as a bill. In this process, morality and reason play very important role in the legislation of law. However, it is through “jurisprudence, the science of actual or positive law” (col. 27) that the decisions of the legislature are actualized through the law court. Here, the importance of jurisprudence is that “it comprises much besides the commands of the sovereign” (col. 26).

But in implementing the law, what parameters should the judge look to? Gray, O’Meara, Hand, Cardozo and Pound reply that in administering the law, the judge depends on “the

customs or standard of the community, the mores of the time, the ideals of the age, statutes and precedents or appeal to predecessors. In the administration of the law or passing of judgment, the judge is often divided along the paths of popular will, what the law stipulates, the customs of the land and his own individual will. The question is: in this dilemma, which of the paths should the judge resort to? The American Sociological Jurisprudentialists' reply is that the judge should resort to precedents. It follows then that American Sociological Jurisprudentialists' conception of law is a new name for legal positivism, because the parameters of its operation are positivistic. But there is no doubt that when positive law oversteps its bounds; it is called to order by using the paradigm of natural law.

The Ideal Role of Law in the Polity

There are two realms in law – the *Lege ferenda* (law as it is or the isness of law) and the *Lege leta* (law as it ought to be or the oughtness of law). The concepts of equity, fairness and justice, always seem to fluctuate between these two realms of law, that is, facts and values. This division between the isness and the oughtness of law largely derives from David Hume's assertion that statements of facts cannot be derived from statements of values. Lon Fuller however, espouses the view that in the analysis of, and especially, in the practice of law, facts (what is) and value (what ought to be) are two regions that must merge and become inseparable. He further says that in law, values are to facts what John Dewey calls the "end-in-view" (1958: col. 106). Joseph P. Witherspoon supports Fuller's view when he (Witherspoon) explains Fuller's view thus, "in the field of purposive human activity about law, value and being are not two different things, but two aspects of integral reality', in which case a statute or a decision 'is not a segment of being, but like the anecdote, a process of becoming'" (1958: col. 106). Witherspoon believes that Fuller's main concern is to "show the best way for the judge and the lawyer, the law teacher and the law student, that it would amount to a sheer waist of time to spend his working day making sharp distinctions between the law that is and the law that ought to be"(col. 107). For Witherspoon therefore, the idea about the duality of law promotes mutual understanding and allows for the thriving of an Intellectual Community. And by the expression Intellectual Community, Witherspoon has in mind a civil society

governed by a civil leader who gains power through the electoral process. Meaning therefore, that Witherspoon's Intellectual Community is similar to, if not the same as, Robert Calhoun's Democratic Community.

Law is a terminal point where decisions and policies come into action in any community. For this reason, it is expected that law should be just in order that the society may be just. In this wise, the way the executive, legislature and judiciary guide and guard law to serve the interest of the community matters a lot. This helps to facilitate the confidence of the citizenry in the law of the land. If we agree that law can be manipulated to serve the selfish interests of the ruler, class, caste or group of persons, then we have to agree that the law could be made an ass for accomplishing selfish ends. Beside conferring and restraining, how does the law reform a criminal or prisoner and re-integrate such individual into the general community? This is very essential because a law that is not balanced is biased and has the propensity to promote violence. In this wise, Abraham Lincoln's assertion that- if law is law, need I a force man to coerce me? Becomes a fundamental truism. It means that law should help the citizens actualize their rights through the stipulations of the constitution of the land. It is perhaps for this reason that Fuller lists Seven Moral Conditions for the validity of law.

- (i) That law must be general
- (ii) That law must not be retroactive
- (iii) That law must be clear
- (iv) That law must not involve contradiction
- (v) That law must not command what is impossible
- (vi) That law must be adequately promulgated
- (vii) That law must be a congruence between official actions and the declared rule.

Fuller's criteria for a just law is an evaluation of the history of law from ancient to contemporary times. In whichever way we view it, draconian laws manifest in every epoch. No matter how we try to make law perfect, the fact remains that the resurgence of draconian laws will always challenge us to think of loftier ways of making law more humanistic. Hence, law does not choose on its own to be draconian, rather, men and women of draconian nature enact draconian laws. That law may always be just therefore, we need to check the excesses of men. This is the crux of the matter.

A.P. d' Entreves in his work entitled: "Deontological theory of law" looks at possible ways by which law can be made to serve the interest of the people. He is of the view that authority and reason are two different angles from which law can be evaluated. The extent to which justice is obtainable in the state is determined by the degree to which the leaders of that state have been able to harness law to meet up with the aspirations of everyone. This takes us to the question of how much reason is involved in politics and policy making? Besides, in history, the dissemination of justice has largely followed Thracymacus' line of thinking that- law is in the interest of the strong therefore might is right. It is also in this light that Calhoun and Dworkin agree that in the interpretation and application of law, plurality of initiative and discretion should be used. In *The Province Of Jurisprudence Determined*, Dworkin says that the *modus operandi* of law is based on Judicial Discretion or Discretion in General. He distinguishes between Procedural Discretion and Substantive Discretion. The former deals with legislation and the latter with the judicial process. However, it is important to note that "the judiciary (as a matter of fact) cannot, as the legislature may, avoid coercion as a measure no matter how it tries to operate within the confines of the constitution" (Caplan, 1977: col. 119-120). The intention of Dworkin is to refute the assertion of the legal positivists that law is the command of the sovereign backed by sanction. In spite of this, all of Dworkin efforts amount to mere antics because in the end, the limit of reason, discretion or initiative in politics cannot be determined. In this wise, natural law theory still remains the ideal basis of law. As the Sophists say, under a tyrannical rule, people resort to natural law. This can be seen in the case of Antigone who flouted the law of the land that no female can bury her death. She was able to do this on the basis of natural law. It is also on same basis that the case of "Riggs vs. Palmer in which the legatee who murdered his testator was disallowed by the court to enjoy the benefits of the 'will' made by the testator" (O'Meara, col. 90). Based on the fact that natural law stands as the last hope of the oppressed, Britz Berolzheimer states that natural law is the "embodiment of the evolution of justice – the study of the conception of justice in order to ascertain its effects" (1964, xxxiv).

By and large, to realize the ideal role of law may entail an ideal society which is utopian. Nonetheless, there is no doubt that law has an ideal role to play in the polity. How best this can be actualized is a task for the philosophy of law, jurisprudence and the protagonists of law.

Conclusion

It is unimaginable to think of a society without law because even gangsters and lawless states have their own laws. Once the rule of law is stipulated, individuals or groups have no option but to comply. The only ground they might refuse to comply by the law is if they perceive the law to be unjust or if the coercive force of the law loses its esteem. Given therefore, that law could be perverted to serve the selfish intents of despots, it follows that law must not only be effective, but must be well promulgated to serve the interest of all.

Various countries of the world interpret and practice law according to their own understanding. France operates a professorial system of law, America combines the sociological and legal realist perspectives of law, while Nigeria like Britain operates the common law system. But whereas these other nations interpret law from the spectacles of their social-cultural milieu, Nigeria remains truncated between British-Christian law, Arab-Islamic (Sharia) law and the Customary or Traditional system of law. The result of this confused approach to law is the lack of respect for the rule of law and for the constitution of the land, all of which stem from the lack of a common basis for the promulgation and interpretation of law.

To say the least, Nigeria is an African country and as an African country it has no choice in the matter but to look back to her culture for the interpretation of law. Generally, the African traditional legal system is based on African cosmology. African cosmology evaluates the universe from a cyclical point of view and within this cyclical triad operates the tripod. The cycle and the tripod form the bases upon which ancient Africans organized the totality of the societal existence, ranging from law to politics, economics, social relations, education and so on. For instance, there is the cosmic order which

replicates itself in the social order, the social order which replicates itself in the self order and vice versa. In the same vein, society consists of the past, present and the future, while man is made up of spirit, soul and body. In law and in legal dispute, a crime committed is to be resolved among three bodies which are; the community, the victim and the criminal. And since the watchword for settling legal disputes is to reconcile the contending parties by reaching a compromise, there was room for victim compensation. Victim remedy and victim compensation in contemporary legal terms is known as *victimology*, a concept that has been erroneously conceived by contemporary legal experts as novel. We dare say that victimology may be a new legal term and practice to Semites and Caucasians whose traditional legal system is largely monistic or at best dualistic. Victimology is definitely not a new concept for Africans among whom such an idea has been an ancient practice. The point then is that contemporary Africans have a lot to garner from their traditional concepts of law, in which is ensconced the principle of victimology, which in turn finds anchor on the cyclical and tripological order of the universe and the society. It is by so doing that Africa can hope to evolve a legal system, a system of jurisprudence as well as a philosophy of law that are akin to the African way of life. Needless to say, the interpretation of law from the African perspective will immensely redress the imbalance and lack of social cohesion that bemoan contemporary African countries.

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