

Legal Cartography: The Result of an Attempt to Formulate an Appropriate Legal Theory for Nigeria

Mojisola Eseyin

Senior Lecturer, Faculty of Law, University of Uyo, P.M.B. 1017, Uyo. Akwa Ibom State,

ABSTRACT

The idea of what is law has eluded many jurists and legal philosophers, yet many have attempted to define law without arriving at a universally workable theory. The major cause of this fruitless effort is the attempt to generalize. Many theories of law have been propounded over the years with one or two expressing the legal system of some of the societies for and out of which they were postulated. Nigerian law and legal system have defied most theories of law when clinically tested against the internal workings of the system and practical applicability. This work examines major theories of law in the light of the Nigerian legal system and finds them not apt and adequate to define or represent what law is in Nigeria. The scope of this work would become unmanageable if desperate attempt is not made to curb same. Our attraction to discussing theories of law is to drive home the point that the Nigerian legal system has defied almost all the theories of law, hence, the need for another look. The approach of this work is not to seek a totally infallible legal theory. That would be propounding an utopian theory. This work seeks to formulate an appropriate legal theory for Nigeria. This research adopts the style of the cartographer in its formulation.

Keywords: Legal Theory, Legal system, Nigeria.

INTRODUCTION:

Cartography is the art and science of graphically representing a geographic area, usually on a flat surface such as map or chart; it may involve the superimposition of political, cultural, or other non-geographical divisions.¹ According to the International Cartographic Association, cartography is the discipline that deals with the conception, production, study and representation of maps.²

In this light, the Cartographer shares a great deal of similarities with the legal philosopher who is concerned with the study of what the 'law is' and conception cum representation of what the law 'ought to be'. In doing this, the legal philosopher swims almost perpetually in the murky and sometimes sinking waters of explicating what the law actually is. By virtue of how deep, circuitous and sinking, the waters of defining law is, a good number of societies especially those whose legal systems have been greatly shaped by external influences through colonization, are almost extricated from this adventure. Some aspects of the society stay completely ignored in attempts to define law, as the cultures and ideologies have not been completely understood by the rest of the world. Nigeria, together with a host of other countries in the black world, belongs here. It is in this light that this work sets out to present a legal cartography of the Nigerian Legal system which takes into cognizance our unique daily experiences, heterogeneity, vast history and peculiar political and social landscape. The Nigerian legal system as we shall see, practices a marriage of convenience. She weds the ideology of each school of law in search of relief from each plague bedeviling her body polity. Perhaps this is why in our view; none of the conception of law by any of the schools of thought describes Nigeria.

CARTOGRAPHY AND LEGAL THEORY FORMULATION

Drawing maps is an occupation, probably, as old as when men began to understand the need for independence. The demarcation of the world across societal and geographical lines has never been an easy one. The cartographer needs a comfortable seat from where he considers ethnic groups, skin colours, climatic conditions, languages, land marks, history, etc., while creating the demarcation. This difficulty explains why one rarely finds straight-edged or perfect lined maps. Like the cartographer, the legal philosopher faces the problem of definition;

¹ [http:// www.britannica.com/Ebchecked/topic/97492/cartography](http://www.britannica.com/Ebchecked/topic/97492/cartography) > accessed 30th June, 2014.

² Canadian Cartographic Association- <http://www.cca-acc.org./resources/what-is-cartography>> accessed 30th June, 2014.

of law, as a concept. To further complicate this problem, his definition or description of law somehow reflects his personal experience with his immediate society. In fact, as Freeman would have it, "...not only does every jurist have his own notion of the subject matter...but his approach is governed by his allegiances or those of his society..."³

Don Pearse wrote, "Although the tools and methods of making maps have changed from the exquisite, hand drawn products of yesteryears to the highly sophisticated ,electronic systems of today ,the definition remains the same..."⁴ A Cartographer is responsible for the design and production of a map or a mapping system or product. He requires artistic and scientific skill to be able to transform his data into a product that is comprehensible to other users. He sometimes uses aerial photographs and data surveys to collect information about the geography of an area; He uses his collected data to create charts, maps, and pictures of large sections of the world's surface geography. In Cartography, the observer interprets photos and drawings and creates new representations from them. Some cartographers focus on creating new maps, while others work on revising old ones.⁵ A cartographer must be able to do this through the use of stereo plotting, mathematical formulas, computerized drafting tools, and photogrammetric skills. They might also be responsible for analyzing the politics and culture of a specific region. The work of cartographers can include any number of projects including city plans, street atlases, country maps, navigation maps and charts, or weather maps.⁶ Basic cartography covers two data components;⁷ location data and attributional data. Location data indicates where the area being depicted is located, while attributional data shows bodies of water, mountains, valleys, hills, and other geographical features of interest and of note. Cartography relies on two major subject areas in its calculation; math, which it uses to represent the Earth and science, which helps to describe and understand geological features. The products of cartography can be divided into two rough types of map, a topographical map which is designed to be true to the landscape that it is depicting and a topological map, which is used for conveying information such as highway routes, dangerous regions of a country, or population density.⁸The former is reputed to be more constant and lasting in its representation while the latter changes frequently as the lives of the people and places depicted on them change.

The attraction to cartography in this work stems from the resulting frustrations of having to find that almost all the legal theories and their ideas of law failed when applied to the Nigerian legal system; hence, the need for a more holistic approach in designing and formulating an appropriate legal theory for Nigeria. The idea of this work is to lay bear what constitutes law in Nigeria as the data, and draw a reflective conclusion of the result of that collection. The research hopes that this approach will produce a legal theory that is Nigerian. It borrows from the field of cartography to "report as seen".

THE PROBLEM OF FINDING THE LAW

There is no axiomatic definition of law and most certainly, there will never be. Any attempt at giving a universally acceptable definition of law, will be akin to forcing a camel through the eye of the needle. Perhaps, it was in appreciation of this impossible task of fashioning out a generally acceptable definition of law that Okunniga posits "nobody including the lawyer has offered, no body including the lawyer is offering, no body including the lawyer will ever be able to offer a definition of law to end all definitions".⁹

³ Freeman, M., *Lloyds Introduction To Jurisprudence (8th Ed.)*, (London: Sweet and Maxwell, 2008) pg. 1

⁴ Pearse is the the immediate past president of the Mapping Sciences Institute, see comment at <http://www.mappingsciences.org.au/what-is-cartography>.

⁵ <http://www.wisegeek.com/what-does-a-cartographer-do.htm>, last visited, February 9, 2015

⁶ Ibid.

⁷ <http://www.wisegeek.com/what-is-cartography.htm>, last visited, February 9, 2015

⁸ ibid

⁹ Okunniga, Inaugural Lecture (1983) series 62 at 207 cited in National Open University Courseware on Jurisprudence and legal Theory 1 at p. 27. [http:// www.noun.edu.ng/NOUN.OCL/pdf/pdf2/Jurisprudence](http://www.noun.edu.ng/NOUN.OCL/pdf/pdf2/Jurisprudence)> accessed 29th June, 2014.

Given the above problem, some aspects of the society stay completely ignored in attempts to define law, as their cultures and ideologies have not been completely understood by the rest of the world. Nigeria, together with a host of other countries in the black world, belongs here.

“Few questions concerning the human society have been asked with such persistence, and answered by serious thinkers as many, diverse, strange and even paradoxical ways as the question ‘what is law?’”¹⁰In a desperate attempt to nail this question to a deserved answer, schools of thought and ideologies have emerged; some, quite too awkward to elaborate. Others delved so deeply into this comatose that, like Immanuel Kant, arrived at a view point that the answer must be sought from a metaphysical perspective.¹¹ Dworkin, in his own attempt, pointed at law, rightly so, to be an ideology beyond simply starring at the rules in a legal system. We now propose to examine in turn, the attempts by some selected but salient schools of thought about law to answer the question-what is law, and to test the implication of these on the Nigerian legal system.

NATURAL LAW SCHOOL

The approach of the natural law thinkers to law is prescriptive and premised on the notion that there exists in human nature a rational order. It is the ideal moral principles to which all positive laws must conform. For the naturalist, a law is merely a direction of nature, which becomes the very fabric upon which all other positive enactments are woven. In simpler terms, any law that lacks the natural touch (which St. Augustine calls Morality)¹² is a mere naked command, backed by brute force. In the natural law school, value statements take the form of moral imperatives providing an objective stance from which the legal and political structures can be ethically evaluated.¹³

Aquinas, Hobbes, Augustine and several other medieval and modern scholars belong here. Lon Fuller insists that the absence of morality in law defeats the very substance of the law itself. Plato, Aristotle and the Stoics all reveal law in the naturalist perspective. It is a theory of ideology seeking for what ‘ought’ to be as against what ‘is’. Naturalists believe that natural law principles are an inherent part of nature and exist regardless of whether government recognizes or enforces them. Naturalists further believe that governments must incorporate natural law principles into their legal systems before justice can be achieved.¹⁴

As perfect as this ideology may sound, it becomes a mere fairy tale when viewed through the lenses of the Nigerian legal system. Is it proper to insist that all laws have a moral backing?

When tested against the Nigerian legal system, the pitfalls in this conception of law become inevitably obvious. The contents of Nigerian laws have not always been moral.

To say the least, the travails of the Nigerian legal system through divergent political upheavals, social unrests and legal regimes, exposes in details, the inadequacies replete in this conception of law. All Nigerian laws (whether legislations or decree, Rules of Court or Practice Directions) have not always been entirely premised on morality. Without gainsaying, the Constitution of the Federal republic of Nigeria, 1999 (as amended) provides for only democratic means of ascension to power when it stipulates in Section 1(2) that: **“the Federal Republic of Nigeria shall not be governed nor shall any person or group of persons take control of the government of Nigeria of any part thereof, except in accordance with the provisions of this constitution”**

This notwithstanding, Nigeria has gone through a plethora of democratic break downs through Coupe de’ Tat. Each time a successful coup against a democratic government takes pace, the new military regime promulgates the constitution Suspension and Modification Decree (what has now come to be popularly known as ‘Decree

¹⁰ Hart, H. L. A., *The Concept of Law*, (London: Oxford University Press, 1971) pg. 1

¹¹ Kant, I., *Metaphysische Anfanggrunde des Reschtshiere*. Quoted in A. P. d’ENTREVES, *Natural Law*, (London: Hutchinson University Press, 1972) pg. 99

¹² Aurelius Augustine, *The City of God*, Book 4, Chapter 4. Quoted from J. Omoregbe, *An Introduction to Philosophical Jurisprudence*, (Lagos: JojaEdu. Research and Pub. Ltd., 1994) pg. 13

¹³ G .W. Paton and D.P Derham, *A Text book of jurisprudence*, 4th ed. (1972) p.2 cited in Micheal E. Ibanga *Learning Legal Theory and legal Method*, (Calabar: Associated Publishers Limited,1996) p.1.

¹⁴ Kathleen Hill , ‘Natural Law’

<<http://legal-dictionary.thefreedictionary.com/Natural+Law> accessed 30th June, 2014.

101'). This in effect makes the Constitution subservient to the ruling military hierarchy. When military regimes forcefully assume power, history shows that they suspend certain portions of the Constitution, most of which may contain Fundamental Human Rights of citizens. Whatever supplements the suspended portions of the law remains law, stands respected as such and receives strict compliance, notwithstanding its goodness or otherwise. Of course, even when an old law is repealed, a new one replaces it comfortably.¹⁵

Furthermore, that the "audi alterem partem"¹⁶ rule is a dictate of natural law is no more hearsay. How, then, do we justify this with the Summary Judgment procedure and the Undefended List ideology in some civil jurisdictions in Nigeria? To expatiate briefly, the Summary Judgment procedure permits the judge to judgment on "**belief**" that the defendant has no good defence to the claimant's claim.¹⁷ The Undefended List procedure is almost similar to the earlier. The plaintiff's case is heard in the absence of the defendant, after having been entered into the Undefended List.¹⁸ However one looks at these, one party is not heard, yet, judgment is delivered, most times, at the detriment of the unheard party. These, too, are laws. They lack the natural law taste of morality.

Again our legislations have not been eternal and unchanging as against the postulate of natural law theory. The lifespan of some Nigerian laws have in fact been very transient. The constitution for instance has undergone series of amendments and outright reformation since independence. Rules of have been revised, The fundamental Rights Enforcement Procedure rules have changed, new Practice directions for Courts emerge regularly, The Nigerian Electoral Act is amended almost once in every four years, .In fact, most Acts, make provisions for amendments. Even the Constitution sets out the procedure to be followed for its amendment. This is recognition by our law that they cannot be constant and unchanging.

POSITIVISM

Legal positivism is the thesis that the existence and content of law depends on social facts and not on its merits. According to positivism, law is a matter of what has been posited (ordered, decided, practiced, tolerated, etc.).¹⁹ Positivism seeks for the law as it is and not as it ought to be. Law, to the positivists, is an artificial creation of the human society; not just descriptive of a social order, but its "cause".²⁰ Positivism seeks to divest law of all extraneous considerations and find validity for law within the law itself. In the approach of positivism, if it is law promulgated and enacted according to due process, then it is law in all its ramifications. Good quality and moral justification of legislations are of no value to positivism. The leading proponent of positivism, John Austin, described law to be **a command emerging from a political superior to a political inferior and which is backed up by sanctions**. The recognition of sovereignty as a paramount fountain from which law emanates is the bedrock of this school. The three crucial components of this definition are the words command, sanction and sovereign. Austin believed that law is a species of command. He further defined a command as "an intimation or expression of a wish to do or forbear from doing something, backed up by the power to do harm to the actor in case he disobeys."²¹

Thomas Hobbes seems to have supported this idea of law when he posited that a law without sword is but mere word. But as rightly observed by Hart, the idea, that law consists merely of orders backed by threats is inadequate to explain modern legal systems.

¹⁵Section 1(3) of the 1999 Constitution of the federal republic of Nigeria (as amended) clearly prohibits military coups. Yet, they do happen and their leaders stay respected.

¹⁶*Latin maxim meaning* 'One must hear from both sides.'

¹⁷Order 11(5)(2) of the High Court Civil Procedure Rules of Lagos State, 2012.

¹⁸Order 8 of the High Court Civil Procedure Rules of Akwa Ibom State, 2009.

¹⁹Leslie Green, 'Legal Positivism'

<http://plato.stanford.edu/entries/legal-positivism/> accessed 22nd June, 2014

²⁰G. Postema, *Bentham and The Common Law Tradition*, (1986), pg. 316

²¹Gautam Bhatia 'The Command Theory of Law: A Brief Summary, and Hart's Objections'

<http://legaltheoryandjurisprudence.blogspot.com/2008/05/command-theory-of-law-brief-summary-and.html>

accessed 5th July, 2014

Meanwhile, modern legal systems have laws governing the formation and implementation of contracts, of wills, marriages and other executory instruments.²² Indeed, this definition when viewed through the mirror of the Nigerian Legal System is empty and unmistakably ludicrous.

Our supreme law does not completely embrace the “superior-inferior” ideology. Foremost, the Constitution is made by “**the people**”.²³ Also, it simply separates the powers of government,²⁴ creating an impossible task of identifying a superior and an inferior.

On the farther end of this definition, the democratic system of government in Nigeria simply makes the term “sanction” sound like fish on dry land.

An examination of the three elements of ‘command, sanction and sovereignty’ will further expose the applicability or otherwise of positivism to the Nigerian legal system.

Command:

To say that the law is a command would mean that all laws are prohibitive and compelling. The corpus juris Nigeria is not merely prohibitive neither do all our laws compel the citizenry to do an act or refrain from doing same. While some laws are prohibitive (as in the case of criminal law) some are in fact benefit conferring. Section 308(1a-c) of the constitution for instance insulates governors, their deputies, the president and his vice from all from of criminal proceedings during the currency of their tenure in office. This provision of the law is benefit conferring in that it confers immunity from civil and criminal proceedings on the named beneficiaries during the pendency of their tenure.

Sanction

By no stretch of imagination, can it be said that all laws are backed by sanction. It will be extremely preposterous to say so. In Nigeria, a vast majority of the laws are not accompanied with sanctions. It is not true that all laws are backed up by sanctions. Several laws in Nigeria are merely descriptive and directive than coercive. For instance, our procedural laws merely provide procedures for certain acts. Also, where the Constitution provides for the Fundamental Objectives and Principles of State Policy,²⁵ there is no sanction for the failure of government to carry out the outlined responsibilities. Even natural laws²⁶ and international law, some of which form the bulk of our constitution, do not fall within this definition of law. Given the foregoing, it appears positivism fails to capture the true identity of law in the Nigerian terrain.

Sovereignty

The Austinian sovereign has the illimitable quality. This sovereign is supreme and no superior could impose any legal duty on him. In other words, the powers of the sovereign are not subject to legal limitation. Nigeria is a constitutional democracy which thrives within the province of the rule of law. Under the doctrine of the rule of law, there is no room for such absolutist sovereign or government. According to Dr. Samson Igbinedion, ‘the implication of this is that even the so-called sovereigns are limited by the constitutions and laws of their countries. Under the CFRN 1999, the President obviously exercises enormous powers but they are not unlimited.

²² Gautam Bhatia ‘The Command Theory of Law: A Brief Summary, and Hart's Objections’

<http://legaltheoryandjurisprudence.blogspot.com/2008/05/command-theory-of-law-brief-summary-and.html>

accessed 5th July, 2014

²³ The preamble to the 1999 Nigerian Constitution (as amended)

²⁴ Sections 4 – 6 of the 1999 Constitution of the federal republic of Nigeria (as amended),2011

²⁵ Chapter 2 of the 1999 Constitution of the federal republic of Nigeria (as amended), 2011.

²⁶ Chapter 4 of the 1999 Constitution of the federal republic of Nigeria (as amended), 2011.

He is subject to the oversight and investigatory powers of the National Assembly. He can even be impeached from office.²⁷ This sovereign does not exist in Nigeria.

The strength of positivism was actually eroded when in 2010 the legal system resorted to a certain ‘doctrine of necessity’ despite constitutional provisions to resolve the problem of who would act for the ailing president. Strict adherence to law as advocated by positivism would have worked hardship on the body polity of Nigeria.

SOCIOLOGICAL JURISPRUDENCE

The sociological school, leading proponent of which is Roscoe Pound, propounds that laws are productions of the process of a society’s social development. Put differently, law is an instrument of social development which actually emanates from the same society itself. Max Weber, Emile Durkheim, Eugene Enrich, etc., all attempted to define law in this light, as a social science. Pound sees law as an instrument which controls interests according to the requirements of the social order.²⁸ Generally, this school appreciates and preaches the relationship between law and social realities. The fundamental tenet of the school is that we cannot understand the nature of law unless we study what it does.²⁹ As much as this ideology is close to explaining the nature of law and implication of legal system in Nigeria, one cannot help but ask; how much of Nigerian laws actually reflect social realities? Obviously, the doctrine of necessity adoption in 2010 is an indication that the existing laws were not adequate and did not reflect the social reality. In addition, the several Child Rights Laws of the States mostly identify infancy to terminate at the age of 18. Whereas, certain developments of adolescence, biologically speaking, can begin from the age of 9. It is also noticeable to mention here that with the presence and development of computers and other electronic gadgets, social networking, etc., children younger than prescribed ages, are prone to committing certain illegal acts from which they are hitherto protected from liability. Several Nigerian laws also prescribe fines as low as twenty five naira (₦25) for certain very serious offences.³⁰ The Hire Purchase Act, for instance, punishes the vendor with a fine not exceeding ₦20 , where he fails to provide adequate information about the purchase transaction.³¹ Do these reflect social realities? Some legislations have become irrelevant and inadequate in the face social changes and development, yet they remain as the governing laws.

The law envisaged by this school of thought cannot be said to reflect the Nigerian legal phenomenon. It also fails to truly capture the Nigerian situation.

REALISM

The main essence of realism as propounded by Justice Oliver Wendell Holmes extols judicial precedent as the law. According to him, the prophecies of what the courts will do in fact and nothing more pretentious are what I mean by the law.³² Law means no more than decisions of Judges. Law is best depicted by what happens in court; thus, reality of law can only be by knowing what the courts do in their purported application of legal propositions. In other words, the provisions of statutes do not, and cannot disclose what courts will do when actual disputes fall for determination, what they actually do is something which can be understood empirically.³³ Simply put, the best way to view law is from the standpoint of an immoral man who cares only for what such

²⁷ Simon Igbinedion ‘Jurisprudence and legal theory 11’

http://www.nou.edu.ng/NOUN_OCL/pdf/pdf2/LAW%20516%20JURISPRUDENCE%20II%20FULLY%20EDITED.pdf accessed June 8th , 2014.

²⁸ Freeman, M.D.A., *Lloyd’s Introduction to Jurisprudence (8th ed.)*, (London: Sweet and Maxwell, 2008) pg. 852.

²⁹ Micheal E. Ibanga *Learning Legal Theory and legal Method*, (Calabar: Associated Publishers Limited,1996) p.26

³⁰ Section 213(5) of the Company and Allied Matters Act, laws of the federation 1990.

³¹ Section 6(4) of the Hire Purchase Act of 1959.

³² Holmes, O., “*The Path of Law*”, in *Havard Law Review*, VOL. X, 1897, No. 8, pg. 459

³³ Micheal E. Ibanga , *ibid.*

knowledge enables him to predict.³⁴ Law is prediction. Gray went further to assert that even a statute is not law until a court interprets it.³⁵

When viewed in the Nigerian context, the conception of law by the realist is but **comic relief**. Nigerian laws have not always been restricted to and will never be restricted to only judicial pronouncements. It would be wrong to say that **only** judicial pronouncements make up the Nigerian legal system. This would simply compromise the supremacy of the Constitution itself, the sovereignty of the people and the doctrine of separation of powers.³⁶

Also, legal provisions that permit the police to act³⁷ do not find feet under this definition. When a private individual is permitted to carry out an arrest,³⁸ at least, before even charging a suspect to court, it also creates a loophole in the realists' view of law. Realism presupposes that laws bequeathing jurisdiction on the courts are not laws in themselves because they have not been adjudicated upon by the courts! In summary, the various directives within the Nigerian legal environment would be no law when weighed on the realists' scale.

MARXISM

Marxist ideologists (led by Karl Marx and Fredriech Engels) see law as an instrument of oppression in the hands of capitalist rulers in the exploitative capitalist system.³⁹Nigeria, though majorly capitalist, runs a mixed economy. Where the Constitution is a promulgation of "the people",⁴⁰ it would be awkward to say that the people did construct an instrument of oppression against themselves.

UTILITARIANISM

Bentham, the progenitor of the utilitarian movement, criticized the law for being written in dense and unintelligible prose. He sought to cut through the thicket of legal verbiage by reducing law to what he thought were its most basic elements—pain and pleasure.⁴¹ His broad assertions have made legal system too simple for effectiveness. He predicts on the assertion that human existence is predicated upon having pleasure and avoiding pain, hence law's job is to maximize pleasure and reduce pain as much as possible. Nigerian legal system defies this blatantly. Laws sometimes inflict pain. The laws prohibiting the use of motorcycles in some parts of town in some Nigerian states do more harm than good to the majority of the people. Majority of the commuters are low income earners who cannot afford cars and yet require a means of transport affordable to them. In this instance, pain has been inflicted on the majority of the people.

PURE THEORY

The pure theory sees law as a norm of action. Hans Kelsen, the proponent of the pure theory of law regards jurisprudence as a normative science and not a natural science. Kelsen avoided the definition of law as a command as Austin did. He sought to present a theory devoid of subjective considerations including, moral, political, religious and other extraneous considerations. He advocated a truly objective legal theory that would be applicable to all legal systems. He attempted a Universalist theory. According to Kelsen, norms exist in hierarchy and every norm is dependent upon a superior norm for its authority and the norms become 'more concrete' and less abstract as one descends the levels within the hierarchy.⁴² To Him, law being a norm of action finds itself in a growing hierarchy, in which the higher norm bestows validity on the lower. This hierarchy continues until it reaches the apex where the Grundnorm resides. The question as to what bestows validity on the

³⁴ Holmes, O., "The Path of Law", in *Havard Law Review*, VOL. X, 1897, No. 8, pg. 459.

³⁵Freeman, M.D.A., *Lloyd's Introduction to Jurisprudence (8th ed.)*, (London: Sweet and Maxwell, 2008) pg. 989.

³⁶ See Sections 1, 4 – 6 of the 1999 Constitution of the Federal Republic of Nigeria (as amended), 2011.

³⁷Sections 4 and 22 of the Police Act.

³⁸Sections 28 (c) of the Criminal Procedure Code And 21(C) of the Criminal Procedure Act.

³⁹Omeregbe, J., *An Introduction to Philosophical Jurisprudence*, (Lagos: JojaEdu. Research and Pub. Ltd., 1994) pg. 150

⁴⁰The Preamble to the 1999 Nigerian Constitution (as amended), 2011.

⁴¹ <http://legal-dictionary.thefreedictionary.com/Utilitarianism>, Accessed 24th September 2015

⁴² G.W. Paton, A textbook of Jurisprudence (4th Edition by G. W. Paton P. Derham) p. 16.

Grundnorm, among others; reveal the inadequacy of the pure theory to remain pure as it should be. Locating the Nigerian Grundnorm has been a herculean task because of the multifarious nature of the Nigerian legal system.

HISTORICAL SCHOOL

The basic premise of the German Historical School is that law is not to be regarded as an arbitrary grouping of regulations laid down by some authority. Rather, those regulations are to be seen as the expression of the convictions of the people, in the same manner as language, customs and practices are expressions of the people. The law is grounded in a form of popular consciousness called the *Volksgeist*.⁴³ Law should emanate from the common consciousness of the people. It is doubtful if the Nigerian legal structure is wired in this context. Customary law which forms a good part of the legal system appears to fulfill the intent of this ideology. There are still legislations which merely substitute Naira for Pounds and Buckingham Palace for Aso Rock. Some of them still retain the foreign legal imposition. Some of the laws merely purloin the English legislations in that field of law. It would be a misstatement to assert that the historical school represents the Nigerian legal scenario.

If all the age long theories of law do not mirror the true Nigerian legal system, what does?

LEGAL CARTOGRAPHY THEORY OF LAW

Any attempt made at generalization when describing a phenomenon will always result in unascertainable and impractical conclusions. When definition is arranged from the view point of prediction it will seek to put the concept in a mould result of which will be destructive to the essence of the very concept it seeks to reveal. It is better to describe and avoid apt precisions in offering definitions of concepts. This is the approach of legal cartography theory.

Like a Cartographer, in this postulate the first approach is to have in focus what constitutes law in Nigeria. What norm is acceptable as law in Nigeria? After the collection, an in depth look will be made at the collection to describe the observation. The result of that observation will be a more appropriate legal theory propelled by Nigerian legal structure itself. Cartography approach may be akin to the pure theory; the difference is that pure theory puts the law in a mould and attempts at generalization. Legal cartography merely collects, observes and describes.

THE TRACE

By way of general overview it is pertinent to outline the sources of Nigerian law. The Nigerian legal system is based on the English common law by virtue of colonization and the attendant incidence of reception of English law through the process of legal transplant.⁴⁴ Nigerian law is greatly influenced by the English law. Traditionally, the sources of Nigerian law are said to include:

- The Constitution
- Legislation
- English law
- Customary law
- Islamic law, and
- Judicial precedents.

Dina et al posit that the Constitution of the Federal Republic of Nigeria 1999 regulates the distribution of legislative business between the National Assembly, which has power to make laws for the Federation and the House of Assembly for each State of the Federation. The current legislation in force at the federal level is largely contained in the Laws of the Federation of Nigeria 1990 (LFN). Laws made after the 1990 law revision exercise of the federal laws are to be found in the Annual Volumes of the Laws of the Federal Republic of Nigeria. Federal laws under the Military, known as Decrees, and state laws, known as Edicts, form the bulk the primary

⁴³ https://en.wikipedia.org/wiki/German_Historical_School. Accessed September 26, 2015

⁴⁴ *Yemisi Dina, John Akintayo & Funke Ekundayo, Guide To Nigerian Legal Information,*

legislation.⁴⁵ International Centre for Nigerian Law has compiled the Laws of the Federation of Nigeria 2000 being an alphabetical index of the enactments and subsidiary legislation made from 1990 to the 31st day of December 2000 that are still in force. All the states have their own legislations. Statutes include Acts, edicts, decrees, ordinance, laws and bye laws.

English law by reason of colonization became applicable in the country through the mechanism of local legislation. The received English law is made up of the common law of England, the doctrines of equity, the statutes of general application in force in England on or before the first day of January 1900, statute and subsidiary legislation on specified matters. Many of those statutes are still in force in the country till date.

Customary law as a source of Nigerian law is classified into two major categories: Ethnic/Non-Moslem and Moslem law/ Sharia. At some instance, Sharia acquires another status farther from the Moslem law category when it operates as a state law. Since 1956, however, Islamic law has been administered in the Northern states as a separate and distinct system. Even then it has only been in relation to Muslim personal law. However, it is better to accord Islamic law its distinct status as a separate source of law because of its peculiarities in terms of origin, nature and territorial and personal scope of application.⁴⁶ Customary law is not codified but is binding on the natives and varies from culture to culture.

In Nigeria legal system judicial precedent is a decision establishing a principle of law that any other judicial body must or may follow when called upon to decide a case with similar issues.⁴⁷ This means that when a particular procedure has been adopted in deciding a particular case all other similar cases that may crop up in future will be decided in like manners.⁴⁸

Apart from these traditional categories, the legal system has resorted to sources not within this contemplated group to arrive at legal decisions when solving legal puzzles. The celebrated doctrine of necessity is one of such. Apart from the primary sources, some secondary sources play important roles especially when formulating judicial precedents. Some judges rely solely on the opinion of legal luminaries and authors. Having looked at the main sources of law in Nigeria and considering the intricacies in such multifarious legal structure, this work will make the attempt at formulating a legal theory for Nigeria.

THE POSTULATE

In attempt to map out an appropriate legal cartography for Nigeria, Law has been noticed to mean and operate as **a complex of rules and reactions emanating from legislative directions, judicial interpretations, native cultures, executive actions and public realities, operating either jointly or independently.**

This definition seems appropriate for the reasons that it caters for the question of sources of law and does not restrict law to formal rules or principles. Again the definition appreciates the fact that in Nigeria, laws do not emanate only from legislative Structures of governance like the National assembly of State Houses of Assembly. Each of the three arms of government though operating under the principles of separation of powers, do make laws. The Legislature makes laws through the process of legislation; the executive does so by way of delegated legislation, issuance of administrative policies.

Law as a Reaction

The common man in Nigeria has, permanently on his mind, thoughts of reactions that might follow his every action. These remain mere thoughts until his actions invite the hand of any of the other factors mentioned. This explains why, in Nigerian criminal jurisprudence, the law cannot punish a man for mere thoughts. Even the courts require evidence that an act was actually committed or that an action was carried out to indicate a positive **mensrea**. In this regards, the law in the books govern and guard and speaks better when an action charges it to implementation. It also means that laws are birthed not just as monuments or an assignment to the legislators to kill the time in the chambers but as an answer to a specific need. It simply means that the hegemony of authority belongs to whichever legal policy become applicable when the need arises. Customary law also reacts to changing phenomenon. When the courts rule that a particular native culture fails the repugnancy test, the people become wary of its practice even when they do not drop it as bad culture. In no distant time the practice may become extinct by virtue of dearth of practice or another legislation outlawing it.

⁴⁵ ibid

⁴⁶ ibid

⁴⁷ Chuks Maduka, *Understanding The Concept Of Judicial Precedent And The Doctrine Of Stare Decisis Under The Nigerian Legal System*, <http://nigerialaw.blogspot.com.ng/> Accessed September 26, 2015

⁴⁸ Chimex, *Sources of Nigerian Law*, <http://www.paradiseng.com/t833-sources-of-nigerian-law>

Legislative Directions

We must not fall into the temptation of defining the legislature in this work to exclude every other person but the Senate, and other constitutionally provided legislative houses and institutions. In fact, recently a National Conference,⁴⁹ which brought together all the people's representatives, took place. If the outcome of this conference is a law, then, the people, who made the law, have become the legislature for the purposes of that law. Also, when a father warns his children to desist from certain acts, or carry out others, he, for the purposes of those directions, becomes a law maker. When a military dictator suspends a part of the constitution and enacts new ones, he has made law; be it acceptable or not. The legislature of this description is any entity from which the law emanates.

The above not being prejudiced, the constitution clearly vests government's legislative powers on the various legislatures.⁵⁰ As such, Acts, Laws, Rules, etc. are laws, prima facie. Where Practice Directions in the High Courts are to emanate from the Chief Judge of a State,⁵¹ such becomes a law maker as far as those directions are concerned, and the directions are law. In Nigeria, the legislative powers of the federation is vested in the National Assembly, and those of the states vested in the State Houses of Assembly of the various states.⁵²

The above notwithstanding all other arms of government make laws. The same constitution empowers the Heads of all Superior Courts to make rules for regulating the practice and procedure of the various courts over which they oversee. In the case of the Supreme Court, section 236 empowers the Chief Justice of the Federation to make practice directions; Section 259 grants similar powers to the President of the Court of Appeal while the Chief Judges of each state enjoy similar powers under section 274 of the Constitution.

In the same vein, section 46(3) empowers the Chief Justice of the Federation to make Fundamental Rights Enforcement procedure Rules. It is parenthetically added that good number of communities in Nigeria still have in existence communal systems. Each of the villages where communal system is in existence has 'a village council'. The Village council acting as a collegiate body makes rules and lay down prohibitions and prescriptions which regulate activities within its domain. These rules, prohibitions and prescriptions are law.

Judicial Interpretations

Legal Cartography theory has not left out the doctrine of Judicial Precedent, which is very vital to the Nigerian legal system. Several decisions from Nigerian courts are mere leakages from an earlier decision, in a similar situation, by a court of equal or higher jurisdiction.

Through the process of adjudication, laws are made by superior courts and our legal system recommends strict adherence to these laws by inferior courts. This is known as the principle of judicial discipline otherwise called 'Stare decisis'. Our Apex court in fact guards jealously this principle. *Osakue v. F.C.E Asaba*⁵³, the Supreme Court per Ogbuagu JSC held thus:

'In the case of *Rossek & 2 Ors v. A.C.B. Ltd & 2 Ors* (1993) 8 NWLR (Pt. 312) 382; (1993) 10 SCNJ 20 @ 54, it was held that the doctrine of stare decisis or precedent, is an indispensable

⁴⁹ The 2014 Nigerian Centenary National Conference kicked off on Monday, March 17th, 2014.

⁵⁰ Section 4 of the 1999 Constitution of the Federal Republic of Nigeria (as amended), 2011.

⁵¹ Section 274 of the 1999 Constitution of the Federal Republic of Nigeria (as amended), 2011.

⁵² Section 4(1 & 6) of the Constitution stipulates:

- 1.** *The legislative powers of the Federal republic of Nigeria shall be vested in a National assembly for the Federation which shall consist of a senate and a House of Representatives.*
- 6.** *The legislative powers of a state of the federation shall be vested in the House of Assembly of the State.*

⁵³ (2010) 10 NWLR (PT. 1201) 1 AT PAGE 35, PARAS B – D,

foundation on which to decide what the law is and that unless there is certainty in the law, there will be no equilibrium in the society.’

In our legal system, the decisions of the Supreme Court are binding on all other courts in Nigeria.⁵⁴

We have also considered, under this perspective, that Judges do actually make rules; either of procedures in court or Practice Directions.⁵⁵

From the Realists’ viewpoint, law remains a mere ‘paperwork’ until the courts give an interpretation to it. This is partially correct as its applicability is found with regards to certain pronouncements. The Nigerian constitution appoints that a person’s culpability or criminal liability can **only** be ascertained by a court’s decision, after having considered the evidence before it.⁵⁶ It is also seen in Section 35 (1) of the 1999 Constitution of the Federal Republic of Nigeria (as amended) that, also, an order of court, is law enough to rob a person of his fundamental right to personal liberty.

Where there is a lacuna in written law, it takes, sometimes, the pronouncement of a court, to carry out such acts not provided for, and termed the doctrine of necessity.⁵⁷

Executive Actions

As an arm of government, the executive is saddled, primarily, with the responsibility of ‘executing’ laws. This notwithstanding, while certain acts or pronouncements only become law upon the imprimatur of the executive, others require it to be a first actor in the process. The declaration of a state of war with another country,⁵⁸ the declaration of a state of emergency, deployment of armed forces for combat duties outside the country⁵⁹ and several other directives,⁶⁰ fall within this group. Even certain laws made by the legislature require executive accent.⁶¹

Also, since the executive includes other officers of the public service,⁶² directives from these persons within their ministries are also laws.

We maintain the considered view that the executive also makes law through delegated legislations, issuance of policies, formulation of guidelines etc.

Public Realities

At the risk of extolling realism, in the legal cartography observation, law is viewed as being most effective at the point where it is physically perceived or felt. This could be called the **law in action**. It is the meeting point of all the ideologies. Whether law is being viewed as God-made, or as commands, or prophecies, from whatever source and to whatever direction, law, to the mad man, remains what law is to that mad man. Personal law is refined from public law and surrounding circumstances. As such, where a man returns to Nigeria from the

⁵⁴ . See *Osho V. Foreign Finance Corporation* (1991) 4 NWLR (PT. 184) 157, *University of Lagos V. Olaniyan & 2 ORS* (1985) 1 NWLR (PT.1) 156, *Dalhatu V. Turaki & 5 ORS* (2003) 15 NWLR (PT. 843) 310, *Action Congress v. Jang* (2009) 4 NWLR (PT 1132) 336.

⁵⁵ *University of Lagos v. Aigoro* (1984) 11 s.c. 152 at 159

⁵⁶ Section 36(5) of the 1999 Constitution of the Federal Republic of Nigeria (as amended), 2011.

⁵⁷ in *Amaechi v. Inec; where the court derailed from the “get only what you ask for” doctrine, and appointed Governor C. Amaechi as the governor of Rivers State, even where his prayers did not include same.*

⁵⁸ Section 5(4) of the 1999 Constitution of the Federal Republic of Nigeria (as amended), 2011.

⁵⁹ Section 5(4)(b) of the 1999 Constitution of the Federal Republic of Nigeria (as amended), 2011.

⁶⁰ For instance, the declaration of public holidays.

⁶¹ Section 58(3) and (4) of the 1999 Constitution of the Federal Republic of Nigeria (as amended), 2011.

⁶² Section 5(1)(a) of the 1999 Constitution of the Federal Republic of Nigeria (as amended), 2011.

United States of America, with his gay mate, claiming to be unaware of the recent legal position against gay marriages in Nigeria, it should rather be noticed that his ‘personal law’, developed from the American public law, has not yet appreciated the Nigerian society, and, as such, is inconsistent with Nigerian public law. Corrective, rather than punitive steps should be taken against him, with a notion to using the later at subsequent instances, where he can no longer plead ignorance of the law. After all, the law of nature demands that punishment be inflicted only for the purpose of correcting the offender and deterring would-be offenders from such acts.⁶³

Law, therefore, includes what **actually** happens, not just what is in the books. To a market thief, if caught stealing, the culprit may be stoned to death or conducted naked round the village with the object of his crime. To him, this is law, not because it is written in the books, but because it controls his actions and even discourages him from some. The inconsistency of personal law with public law does not make it less a law; it only serves as a reminder of the superiority of the later.

This ideology perfectly merges Natural laws with Positive laws and causes an auto-replacement where the later has a lacuna. For instance, there is no written law against jumping from the roof of a sky-scraper. Yet, the individual planning it needs no prophet or legal provisions to remind him of the consequences of such act. This, also, is law.

Either Operating Jointly or Independently

From the above discourse, law can be either of the four pointed out items or all, or some of them put together. Much explanation is not required for this, as the reader must have noticed this point while reading through the rest of the work. The Constitution, for instance, is law and is a compendium of all four sources above mentioned.

CONCLUSION

It would be making a very wrong assumption to presume that this work has put an end to the quest for the true meaning of law as a concept in Nigeria. The essence, rather, of this work is to re awaken the search for the true meaning of law in Nigeria. It is an attempt at formulating a new legal theory for Nigeria using the legal cartography approach. It is the opinion of this work that the legal cartography approach is open to further use in the search for the true meaning of law in Nigeria and any other legal system. This work has done two basic things, firstly, it has introduced a new approach to legal theory which may be adopted by any legal philosopher to examine any legal system; secondly, it has put the legal cartography approach to a maiden use to formulate an appropriate legal theory for Nigeria. In conclusion, using the legal cartography approach to view the Nigerian legal system, Law is best described as **a complex of rules and reactions emanating from legislative directions, judicial interpretations, native cultures, executive actions and public realities, operating either jointly or independently.**

⁶³Thomas Hobbes’ 19 Laws of Nature; the 7th.

The IISTE is a pioneer in the Open-Access hosting service and academic event management. The aim of the firm is Accelerating Global Knowledge Sharing.

More information about the firm can be found on the homepage:

<http://www.iiste.org>

CALL FOR JOURNAL PAPERS

There are more than 30 peer-reviewed academic journals hosted under the hosting platform.

Prospective authors of journals can find the submission instruction on the following page: <http://www.iiste.org/journals/> All the journals articles are available online to the readers all over the world without financial, legal, or technical barriers other than those inseparable from gaining access to the internet itself. Paper version of the journals is also available upon request of readers and authors.

MORE RESOURCES

Book publication information: <http://www.iiste.org/book/>

Academic conference: <http://www.iiste.org/conference/upcoming-conferences-call-for-paper/>

IISTE Knowledge Sharing Partners

EBSCO, Index Copernicus, Ulrich's Periodicals Directory, JournalTOCS, PKP Open Archives Harvester, Bielefeld Academic Search Engine, Elektronische Zeitschriftenbibliothek EZB, Open J-Gate, OCLC WorldCat, Universe Digital Library, NewJour, Google Scholar

