NATIONAL OPEN UNIVERSITY OF NIGERIA

SCHOOL OF LAW

COURSE CODE: LAW516

COURSE TITLE: Jurisprudence and Legal Theory II

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COURSE WRITER: Dr Simeon Igbinedion
Faculty of Law,
University of Lagos.

EDITOR : **Prof. A Obilade**
Faculty of Law
University of Lagos

AG. DEAN: **Ifidon Oyakhiromen, PhD. BL**
School of Law, NOUN

PROGRAMME LEADER:

COURSE COORDINATORS: **A Onuora-Oguno, F Anene (Mrs.),**
S Godwin- Clark (Mrs.) E. Ugbejeh,
NOUN

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LAW 516 JURISPRUDENCE AND LEGAL THEORY II

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UNIT 1 THE PROVINCE OF NATURAL LAW

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1.0 INTRODUCTION

Of all the Schools of jurisprudence, natural law school stands out. This is so not because it is the most important of all the schools but on account of the fact that it is about the only theory that is sustained by idealism. In other words, natural law exists not in the material world but in the world of ideas. All other schools have one or more negative things to say about the failure of natural law to meet the test of science, that is, its inability to be demonstrated scientifically.

There is a dearth of consensus on the definition and description of natural law. Consequently, different people perceive natural law differently. Thus, while classical philosophers like Plato, Aristotle, St. Augustine, and Thomas Aquinas offer similar definitions of natural law, modern natural lawyers attribute to natural law what classical natural law theorists could not have probably envisaged.

In this Unit, we shall examine the meaning of natural law from the perspectives of ancient and modern times.

2.0 OBJECTIVES

At the end of this Unit, you will be able to:

Demonstrate the historical origin of natural law; and
Analyse the ancient and modern meanings of natural law.

3.0 MAIN CONTENT

3.1 Meaning of Natural Law

Natural law is that branch of law that is variously defined or described as the law of nature, higher law, eternal law, divine law, etc. While defining or explaining the scope of natural law, Roman orator, Cicero, said as follows:

> True law is right reason in agreement with nature; it is of universal application, unchanging and everlasting; it summons to duty by its commands, and averts from wrongdoing by its prohibitions. And it does not lay its commands or prohibitions upon good men in vain, though neither have any effect on the wicked. It is a sin to try to alter this law, nor is it allowable to attempt to repeal any part of it, and it is impossible to abolish it entirely. We cannot be freed from its obligations by senate or people, and we need not look outside ourselves for an expounder or interpreter of it. And there will not be different laws at Rome and at Athens, or different laws now and in the future, but one eternal and unchangeable law will be valid for all nations and all times, and there will be one master and ruler, that is, God, over us all, for he is the author of this law, its promulgator, and its enforcing judge. Whoever is disobedient is fleeing from himself and denying his human nature, and by reason of this very fact he will suffer the worst penalties, even if he escapes what is commonly considered punishment.1

According to Burlamqui in his Principles of Natural Law (1751):

> Natural law comprises rules which so necessarily agree with the nature

1 Cicero, Republic III.xxii.33, in De Re Publica; De Legibus 211 (C.W. Keyes, trans., Harvard University Press, Cambridge, Mass., 1928). Quoted in Brian Bix, *Jurisprudence: Theory and Context 66 (US: Carolina Academic Press, 3rd* Edition, 2004).

> and state of man that, without observing their maxims, the peace and happiness of society can never be preserved …. They are called natural laws because a knowledge of them may be attained merely by the light of reason, from the act of their essential agreeableness with the constitution of human nature: while, on the contrary, positive or revealed laws are not founded upon the general constitution of human nature but only upon the will of God: though in other respects such law is established upon very good reason and procures the advantage of those to whom it is silent.2

Therefore, natural law theory offers or provides an insurance against the chaos and disorder common with the human society. Recall that in 1996, the International Law Commission, a UN agency charged with the responsibility of codifying and of progressively developing international law released the Draft *Code of Crimes Against the Peace and Security of Mankind. Amongst other* things, the Code enumerated international crimes to include aggression, genocide, crimes against humanity, crimes against the United Nations and associated personnel, and war crimes.

To Kelsen, in his What is Justice? (1957):

> The natural law doctrine undertakes to supply a definitive solution to the eternal problem of justice, to answer the question as to what is right and wrong in the mutual relations of men. The answer is based on the assumption that it is possible to distinguish between human behaviour which is unnatural, hence contrary to nature and forbidden by nature … certain rules which provide an altogether adequate prescription for human behaviour… Nature is conceived of as a legislator, the supreme legislator.3

Note that Radbruch – a positivist – who witnessed the horror and destruction wreaked by the German Reich on its neighbours had to fall out with his first faith in preference for natural law. According to him in his Five Minutes of Legal

2 Quoted in L.B. Curzon, Jurisprudence 37 (London: Cavendish Publishing Ltd, 2nd Edition, 1995).
3 Ibid, p. 37.

Philosophy (1945):

> There are principles of law that are stronger than any statute, so that a law conflicting with these principles is devoid of validity. One calls these principles the natural law or the law of reason … the work of centuries has established a solid core of them.

Natural law could be synonymously called the law of nature, divine law, eternal law, etc. Natural law theories are basically theological or secular. Theological theories rely on allusion to God, the Holy Books and the prophets, in arguing for the existence or validity of natural law. These theories regard the universe as being founded and ruled by some deity, God, etc. The creator has laid down rules and principles by which the universe (including the earth inhabited by human beings) is ordered and regulated. It is from these principles that the morals or conscience of humanity derive.

On the other hand, secular theories depend on human reason (or will). They canvass the view that natural law exists in rational human beings who are created by God. Because they are the creatures of God, they possess the rational idea, the reasoning capacity to know what is good and what is bad. They have the intellect even without the assistance of another person to discover natural law or the law of nature. Guided by the ensuing knowledge, he is able to order his life, according to his choice, in a moral way or in an immoral manner. In other words, secular theories demystify natural law by detaching God therefrom, that is, by positing that natural law will or can be independent of God. Thus, on a rather extreme note, Hugo Grotius said that there would be natural law even if there were no God.

SELF-ASSESSMENT EXERCISE 1

What is natural law?

3.2 Essential Features of Natural Law

From all that we have said so far, it is possible to distil or extract the essentials of natural law as follows:

(a) Natural law is universal, unchanging and everlasting;

(b) That which is good is in accordance with nature but that which is evil is contrary to nature. Therefore, natural law is good;

(c) There exists an order in nature which is rational and which can be known by man;

(d) There are absolute values, and ideals emerging therefrom, which serve as the validity of laws. A law lacking in moral validity is wrong and unjust. On this basis, natural law invalidates certain manifestations of the positive law and provides an ideal towards which the positive law should strive.

3.2.1 Some Analyses of the Features of Natural Law

(a) Natural law as Universal, Unchanging and Everlasting

Natural law is usually claimed to be universal, unchanging, and everlasting. Looking at the major legal systems of the world, this assertion can hardly be faulted. This is because there are traces of natural law existing in them irrespective of time, space and geography.

Let us consider, for example, the social contract theory, which derives from natural law. It is a theory which states that citizens agreed to submit their rights to their rulers in return for responsible and responsive rulership or governance. It forms the basis of modern State system anchored on democracy. Democracy is the government of the people, for the people and by the people. There is hardly any system of government in contemporary world that is not founded upon democracy. Any exception is an aberration.

Take also fundamental human rights which are said to have pre-dated humanity. They are rights that appertain to a person by reason of his being a person. Amongst other things, human rights regime guarantees or upholds the equality of all before God and law, right to life, freedom of speech, freedom from discrimination, etc. Citizens cannot barter them away. In contemporary international human rights law, these rights are grouped into generations of

rights. And they are domesticated or deemed to be operative in all States of the globe.

However, notwithstanding the universality and the existence of certain natural law concepts in all legal systems, note, however, that in different civilizations past and even present, natural law has been a ready tool in the hands of persons and systems of varied ideological persuasions. Thus, natural law has been used by democrats, liberals, autocrats, dictators, etc to advance their causes, causes that have been positive and negative to the common good of the people. This probably accounts for why Prof. Alf Christian Ross (1899-1979) in his On Law and Justice, § 58 (p. 261) wrote:

> Like a harlot, natural law is at the disposal of everyone. The ideology does not exist which cannot be defined by an appeal to the law of nature. And, indeed, how can it be otherwise, since the ultimate basis for every natural right lies in a private direct insight, an evident contemplation, an intuition. Cannot my intuition be just as good as yours? Evidence as a criterion of truth explains the utterly arbitrary character of the metaphysical assertions. It raises them up above any force of inter-subjective control and opens the door wide to unrestricted invention and dogmatics.

In other words, natural law is at the beck and call, at the service of all. Put differently, natural law has been used to advance the freedom of humanity; at the same time, it has been utilized to perpetrate inequality or slavery. Such was the case in the civilizations of Egypt, Mesopotamia, China, India, Rome and Greece.

(b) Good and Evil

Natural law is usually associated with good. This is predicated on the origin of nature or humanity. The almighty creator is good and in Him is no evil. He is omnipotent and omniscient. In the fullness of these qualities, He designed the universe (including humanity) in an orderly fashion for the good of all. Operating within the scope of that design harmonizes with that order. Deviation therefrom means disorder or rebellion. Therefore, anything done

consistently with the divine design is good; anything contrary is bad or evil. Thus, man-made law that does not meet the requirement of divine good is evil.

(c) Man's Comprehension of Nature

Man, as a creature of the almighty God, has some of the qualities of the creator. One of such is intelligence. Another is reasoning power. When God created man, He gave him the power of intelligence and of reasoning. Rene Descartes says that to live according to reason is to live naturally. With these, man is able to decipher or discern what the divine is or possibly is. Thus, according to Aquinas, natural law represents man's participation in the cosmic order or universe with the aid of the power God has put in man. We may call that capacity to participate in nature conscience or that still small voice within us, telling us what is good and what is not, and propelling us to do that which is good and to reject that which is evil. Note that what man ultimately does may not necessarily be a reflection of this mental exercise because man is also invested with the power of will or of choice. Consequently, man can choose or decide to, for example, kill another person despite his knowledge of its inconsistency with nature.

Note that natural law is usually used synonymously with morality. Where such morality coincides with natural law, such synonymous usage is justified. Where, however, the morality relates only to a person's social or 'moral' way of life, it should be understood as such without necessarily attributing it to natural law.

(d) Relationship Between Natural Law and Positive Law

The clash between natural law on the one hand and positive law on the other is legendary. Natural law, which essentially focuses on de lege feranda (the law as it ought to be), is a law whose existence is validated or proved by reference to transcendental, metaphysical, idealistic, theological or rationalist arguments. Adherents of natural law argue that natural law reflects the order of nature and represents a blueprint for decent or orderly existence of humanity. Such order is superordinate or superior to positive law. Natural law

is predicated on value judgements, representing a standard against which the goodness or otherwise of positive law is measured.

Therefore, in order for humanity to live in peace and harmony, there is the need for human beings to live in accordance with the law of nature. Under this scheme, every human law that fails to measure up to the moral standard set by natural law fails the test of legal validity. Such a law would be unworthy of the name 'law.'

On the other hand, positive law – which fundamentally concentrates on lex *lata (the law as it is) – is law made by man. Proponents contend that this is* law whose existence can be proved scientifically in the sense of its being physically observed, located and touched. In disclaiming the position of natural law, they accuse natural law theorists of confusing the 'is' with the 'ought.' Put differently, the contention is that natural law tends to derive an 'ought' proposition from an 'is' proposition. This muddles up the system of thought.

According to Austin, the validity or legitimacy of the (positive) law is one thing, its merit or demerit another. What he meant to say was that positive law is concerned strictly with the validity of the law. Any discussion of its merit or demerit was certainly not the concern of positive law. If, however, moral philosophy is interested in that subject, all well and good. But it must do well to avoid confusing the issue of validity with that of the propriety or otherwise of the law.

Moreover, as Professor Hart stressed, there is no necessary connection between law and morals. By this he did not deny that there are common grounds or convergence between law and morality. Rather, he is saying that it is not a matter of course that law must be connected to morals or that one must be tied to the apron string of the other. That is why there are wide areas of divergence between law and morality. Examples are given below:

Immanuel Kant says that the thrust of law is external (that is, law intervenes only when there is an external manifestation of what a person is thinking about) while morality is a matter of internal conscience. This is evident in

inchoate offences in criminal law such as the law of attempt, as codified in *S. 4 of the Criminal Code. Therein, an attempt does not become punishable* unless the offender manifests his intention by some overt act.

Law is a product of conscious, formal procedure in contrast with morality which is created informally. Man-made law does not just emerge out of the blues with the few exceptions of dictatorships or autocratic systems (for example, military governments in Nigeria) where the will and caprice of one man or a group of men can be legislated into law overnight. In modern democracies or even pseudo-democracies, enacting a bill into law goes through series of procedures outside and within the legislative houses. It is only when it is finally passed by the legislators and assented to by the President or Prime Minister that it becomes law. But there is no such air of formality or procedures in the making of morality. In fact, morality is not made; it grows or emerges. Pre-existing moral norms are handed down from generation to generation until the people find it unacceptable and abandon it. Regarding the law of God, you should recall that natural law is everlasting and unchanging. It has always been there, waiting to be discovered by the intelligence or reasoning power of man.

Law prescribes right or wrong judgment but natural law prescribes good conduct. Recall that Austin insisted on the separation of the validity of law from its propriety. Therefore, the validity of law is confined only to the issue of whether it is right to do one thing or wrong to do another. The law that gives me the right to own acres of land in a community of landless peasants is valid if it was promulgated in accordance with the requirements for such promulgation, for example, the Land Use Act (LUA) 1978. But, from the perspective of natural law or morality, this would be bad or evil because one man possesses to the detriment of many others. Therefore, LUA would be a bad law.

Law prescribes sanctions against violations, e.g., imprisonment, fines, seizure, confiscation or forfeiture of property, etc. In many cases, these sanctions may be coercive, for example, criminal law. Although others may be not so coercive – for instance, power-conferring laws such as those on marriage, wills, and contracts – they still contain some elements of sanctions

or deprivation or denial of benefits or privilege. On the other hand, violation of natural law is not punishable by man but by God or the creator. See, for example, the Holy Bible and the Holy Koran. By and large, note that only God or spiritual forces have the mandate to punish breach of the divine will. Moreover, the punishment of any deviation from the morals fashioned by man is different from that stipulated by positive law. The sanction, moral sanction, is of a different kind, different from legal sanctions. Moral sanction is guided more by public opinion than by anything else. For example, the criminal law imposes on a parent a duty of care towards his infant child but it does not similarly obligate a non-parent. But natural law or morality would impose equal duty of care on both biological and non-biological parents.

SELF-ASSESSMENT EXERCISE 2

1. What are the features of natural law?
2. In what ways is natural law different from positive law?

4.0 CONCLUSION

Natural law has been variously defined by legal philosophers ancient and modern. In contradistinction to positive law, natural law occupies a higher pedestal. One of the features of natural law is that it is universal, unchanging and everlasting. A review of major legal systems of the world can confirm this to a large extent. For example, we have seen this by considering the social contract theory and fundamental human rights.

However, we noted that natural law has, unfortunately, been used in different civilizations, past and even present, as a ready tool in the hands of persons and systems of multifarious ideological bent. Therefore, natural law has been used in the defence of democrats, liberals, autocrats, dictators, etc. It was in this context that Prof. Ross said that natural law was like a harlot at the disposal of everyone, that is, the good, the bad and the ugly.

Yet it is relieving to note that natural law is associated more with the good than with the bad. Moreover, man is imbued with the capacity to understand or

discover natural law through his intelligence and reasoning power.

Finally, the relationship between natural law and positive law is of interest because natural law philosophers propound that natural law is a template for measuring the goodness, utility or validity of law, including positive law. On the other hand, positive legal philosophers vehemently reject this. Positivists criticize natural law for being unscientific in methodology.

But one thing positivism cannot take away from natural law is the latter's appeal to godly authority or to conscience in the hope of making the world a better place for humanity.

5.0 SUMMARY

In this Unit, we examined the meaning and features of natural law. Natural law is that branch of law that is severally defined or described as the law of nature, higher law, eternal law, divine law. In the words of Roman orator, Cicero, natural law is, inter alia, true law which is

> …in agreement with nature; it is of universal application, unchanging and everlasting; it summons to duty by its commands, and averts from wrongdoing by its prohibitions. And it does not lay its commands or prohibitions upon good men in vain, though neither have any effect on the wicked.

In a similar vein, Burlamqui sees law as comprising rules which so necessarily agree with the nature and state of man that, without observing their maxims, the peace and happiness of society can never be preserved.

The study of natural law could be done from the perspective of theology or secularity. While the former is tied to religion, the latter is not, being based on rationality. The essential features of natural law include universality, goodness and rationality. There are grounds of convergence and divergence between natural law and positive law.

6.0 TUTOR-MARKED ASSIGNMENT

How relevant is natural law to contemporary legal order across the globe?

7.0 REFERENCES/F URTHER READINGS

1. Brian Bix, Jurisprudence: Theory and Context 66 (US: Carolina Academic Press, 3rd Edition, 2004).

2. L.B. Curzon, Jurisprudence 37 (London: Cavendish Publishing Ltd, 2nd Edition, 1995).

UNIT 2 HISTORICAL ODYSSEY OF NATURAL LAW

CONTENTS

1.0 INTRODUCTION

In consolidating on Unit 1, Unit 2 is examines the historical odyssey of natural law. In other words, Unit 2 looks at the processes through which natural law has gone in attaining the status we attribute to it in contemporary times.

The Unit does this by considering sub-topics including early origins and the scholastic period of natural law; its secularization and decline; and its rebirth and restatement.

In discussing these sub-topics, we shall be effectively looking at aspects of natural law that will enable us to know the ways of yesterday with a view to understanding today for the benefit of tomorrow.

2.0 OBJECTIVES

At the end of this Unit, you should be able to:

Compare and contrast the ancient and modern history of natural law

3.0 MAIN CONTENT

3.1 EARLY ORIGINS

In pre-modern societies there was a union of secular and religious beliefs. In fact, societies were believed or deemed to be ruled or directed by gods or spirits. In other words, invisible forces were involved in directing the affairs of the physical world including, of course, the world inhabited by the human race.

Against this background sprouted the belief that there was a power beyond human power, directing the affairs of the human society with certain rules, principles or laws. Discovery of these laws ultimately enabled the human society to access the divine good plans or intentions of these spiritual forces for humankind. If human society tried well enough, it could discover them. Put differently, in order for the human society to experience cosmic order and harmony, it was essential for it to harmonize its conduct with such divine plans and intentions.

3.1.1 Graeco-Roman Heritage

This belief system was boosted in the classical era in Europe when the rise of Judeao-Christian tradition saw monotheism replacing polytheism. According to Chinhengo, this belief in one deity paved the way for the definition of a singular purpose for the human society with the law-giver providing basic principles for human morality and law through the scriptures and revelations of His prophets, and demanding that societies rule themselves on the basis of these principles under the rulership of kings who had the right to do so as of divine right.

However, the Greek system of belief, based on polytheism, had contrary view of natural law. In a manner that is parallel to the spiritual/religious coloration that the Judeao-Christian monotheist religion gave natural law, Greeks developed the idea of rationalism. Rationalism holds that the universe, being governed by intelligible laws, was capable of being understood by the human mind. From such rationality, it was possible to derive rational principles that could be put to

use in the governance of human conduct in the society.

Thus, Socrates (470-399 BC) and Plato (428-348 BC) asserted that there were principles of morality which were discoverable through the processes of reasoning. Plato further developed the idea of justice as an end in itself having qualities of truth and reality higher than positive law. On his part, Aristotle (384-322 BC) saw nature as the capacity for development inherent in particular things and aimed at a particular end. The Stoics, who taught the development of self-control and fortitude as a means of overcoming destructive emotions, identified nature with reason. They posited that reason governs all parts of the universe and that human beings were equally governed by reason. They then concluded that people live 'naturally' when they conduct their lives in accordance with reason. Cicero agreed with the submissions of these philosophers when he asserted that nature provides rules by which the human society ought to live and that these rules were discoverable through reason.

In ancient Greece, the belief flowered that natural law was metaphysical, transcendental, and independent of the will of the individual. Thus, Sophocles (496 BC-406 BC) in Antigone describes natural law as the unwritten and unfailing statutes of heaven. The Greeks distinguished between logos (laws of heaven) and nomos (man-made laws). Where both are harmonized or, where *nomos harmonizes with logos, there will be cosmic harmony, a condition in* which everything functions efficiently. In the event of a disconnect between both, there will be chaos or anarchy. Redressing this would entail going back to status *quo ante bellum. Therefore, the destiny of the Greek society was tied to the apron* string of heavens. The polis (City State), or civil society, was to be organized in a way consistent with the cosmic order.

Generally renowned to be the father of philosophy, Socrates was of the view that the laws of the polis were a reflection of natural law. According to him, natural law was each doing what pertains to his nature. You should recall that Socrates was condemned to death because he taught young people normal ideas. He exhibited the height of his morality when he resisted moves by his loyalists to work for his escape because his escape would be unjust. Therefore, he drank the hemlock and died.

Plato (427-347 BC) was a student of Socrates and the originator of the Academy – a school where the philosopher and the student would engage in an unending crusade for truth. According to Plato, society will be peaceful and orderly if only those well trained take over the reins of governance. In other words, persons endowed with intellectual superiority are exclusively those entitled to rule. The idea of philosopher-kings emanated from here. His proposition is that a person who has gone through the process of good, seasoned training should aspire to leadership position.

We may compare this Platonic view with contemporary developments. In the light of the currency of democracy across the globe, Plato's proposition would be a hard sell. Democracy is animated by majoritarian rule. If a person, even though untrained in the intricacies of leadership, emerges as a President of a country, so be it. The people may sink with his ignorance but he validly remains the President.

Taking a cue from his master, Plato said that each man was to do what ethically pertains to him. In other words, natural law sanctions each person to do only that which nature assigns to him. Therefore, a slave cannot be master. This is another way of saying that social mobility is a taboo. Plato upheld the legitimacy of inequality or slavery.

Aristotle, a student of Plato, in his Nichomachean Ethics, wrote about justice. He defined justice as treating equals equally and unequals unequally. He identified some types of justice such as natural justice, conventional justice, commutative justice, corrective justice and distributive justice. He also accepted the naturalness of slavery. This is quite clear from his definition or description of justice.

Pythagoras (580 – 500 BC) also had something to tell us about justice. According to him, equality was tantamount to justice. Thus, the reward or punishment of human action should be proportional to his degree of his goodness or badness. Recall that Pythagoras defined justice in mathematical terms as follows:

> Justice is like a square number. It gives
> the same for the same and thus is the
> same multiplied by the same.

The morale of this mathematical conceptualization is proportionality. So, when a person damages the property of another, he has to make it good through restitutio *in integrum or restore the victim to the condition in which he would have been* had the wrongful conduct not occurred.

SELF-ASSESSMENT EXERCISE 1

What were the contributions of Greek heritage to the development of natural law?

3.1.2 Roman Heritage

Roman law, otherwise known as jus civile, was classified into three types as follows: res (law of things), actio (law of action), and persona (law of persons).
Note that only a Roman citizen had full capacity to possess right and to create obligations. The head of the Roman family (pacta familia) had full contractual capacity. The wife, or a woman for that matter, had diminished capacity. Women, slaves, infants and persons of unsound mind lacked capacity.

Jus civile was applicable between citizens of Rome only. As the society grew and interactions with the outside world increased, there was the need to devise a law or a system of law to apply to non-citizens. This necessity led to the emergence of jus gentium. It was a law developed by Rome to apply to foreigners, or to transactions between Romans and non-Romans. Jus gentium is the crystallization of natural law and the beginning of international law. The Justinian Code was the first code produced by jurisconsult (commissioned by Emperor Justina) to apply to all irrespective of race, creed, status, and nationality.

One of the leading lights of this era was Cicero, the Roman orator. He had defined or described natural law as:

> True law as right reason in agreement with nature; it is of universal application, unchanging and everlasting; it summons to duty by its commands, and averts from wrongdoing by its prohibitions.

Note, however, that Rome was also a slave owning society. Consequently, natural law in Rome accommodated a world of slavery or inequality.

Note again that Greek and Roman civilizations were just some of the many civilizations that contributed their quota to the development of jurisprudence generally and natural law particularly. Therefore, shutting out other civilizations from the radar of discourse smacks of Eurocentricism and narrow-mindedness. Thus, according to Prof. Oyebode, civilizations such as Egypt, India, China and Mesopotamia (now Iraq) stamped their feet on the canvas of natural law.

3.2 SCHOLASTIC PERIOD (1100 – 1400)

This was the Medieval Period in Europe that witnessed the theological rendition of natural law especially by St Augustine (354 – 430) and St. Thomas Aquinas (1224-74). With the Catholic Church leading the system of thought, the period saw the integration of rationalist and religious approaches to natural law through the seminal work of St. Thomas Aquinas.

St. Augustine (354 – 430) believed that our earthly existence has been irredeemably tainted with the original sin. He distinguished between the City of God and the City of man. While the City of God refers to doing the will of God, the City of man symbolizes a life of sin. He categorized law into three groups: *lex temporalis, lex naturalis, and lex aeterna.*

On his part, Aquinas divided law into four groups as follows: eternal law, divine law, natural law and human law. According to him, law must be for the common good, and just. Where, however, such law is unjust, it was unworthy of being called a law. Thus, the saying lex injusta non est lex (an unjust law is no law).

3.3 SECULARIZATION OF NATURAL LAW

Under the influence of Reformation or Renaissance in Europe, the religious clout of the Roman Catholic Church waned. The direct implication of this was the Catholic Church's loss of monopoly of thought. Protestant theories bloomed. Their main remit was to develop the theory of natural law independent of the

explanation thereon offered or paraded by the Papacy.

One of the secular natural law theorists, Hugo Grotius – Dutchman and jurist – separated natural law from its theological foundation. This he did by insisting that natural law was independent of divine law or command, and emphasizing that natural law was derivable from human reason or intellect. He even went as far as saying that natural law would exist even where there was no God. In other words, he emphasized that natural law exists independently of God.4

3.4 DECLINE OF NATURAL LAW

Against the background of the emphasis on scientific approach to learning, an approach that favoured rationalist and secularist perspectives to the study of human phenomena, the influence of natural law dwindled in the 18th and 19th centuries. There was an increasing assault on natural law for its reliance on metaphysics and idealism.

For example, David Hume (1711-1776) criticized natural law for attempting to derive an 'ought' from an 'is.' The fall of natural law incidentally saw the rise of positivism with the likes of John Austin and Jeremy Bentham insisting on the separation between positive law and morality.

3.5 REBIRTH OF NATURAL LAW

However, the 20th century witnessed a revival or rebirth of natural law doctrines because of a combination of factors, representing the failure, weakness or excesses of positivist doctrines. We shall consider some of these briefly:

(a) Horror of Second World War

The Second World War, fought from 1939-1945, was prosecuted under the inspiration of extreme positivism where Nazi Germany was, in vindication of Hegel, deified the State and where, in the mould of John Austin, Hitler

4 Austin M. Chinhengo, Essential Jurisprudence 23 (Great Britain: Cavendish Publishing Limited, 1995).

became the uncommanded commander to whom obedience was compulsorily offered. It was, therefore, no surprise that the war exterminated six million Jews from the face of the earth. The horror of the war jolted the international community from its stupor. Thus, the Preamble to the UN Charter 1945 provides, in part, that the UN was determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind. Coming on the heels of the adoption of the UN Charter was the Universal Declaration of Human Rights (UDHR) 1948, and the Covenants – the International Covenant on Civil and Political Rights 1966 and the International Covenant on Economic, Social and Cultural Rights 1966, etc. Since 1945 till date, the rebirth of natural law has manifested in a glut of human rights instruments at both international and regional levels and in domestic legal systems. The recurrent refrain in all these instruments and laws is the protection of human rights of persons and the restraint of the freedom of action of States. In other words, the natural law regime has succeeded in institutionalizing a bulwark against the excesses of positivism in the governance of peoples across the globe.

(b) Human Rights Violations

This is allied to the observation made on the Second World War. Prior to 1945, human rights were the reserve domain of each sovereign State. It was the norm for States to disregard or suppress the human rights of its citizens and other people. No external interference was tolerated. Thus, Germany felt insulted when the League of Nations sought to know why Germany was maltreating its Jewish minority, and terminated its membership of the League in 1933. But since 1945, the tide has turned against violators. Apart from international, regional and domestic instruments, there are mechanisms put in place to enforce or to cause the enforcement of human rights, and there are avenues for victims of violations to vindicate their rights.

(c) Scientific Excesses

The necessity for the revival of natural law has come into sharper focus with the excesses that accompanied scientific progress and advance. Science has come to ease the hardship hitherto experienced by humanity in daily

existence. It is a welcome development. However, there have been instances where pursuit of scientific inquiry has been geared immediately or ultimately towards harming human race. Such activities include developing biological and chemical weapons, weapons of mass destruction, etc. Recall that US invasion of Iraq in 2003 was predicated on the search for weapons of mass destruction. And the current face-off between Iran and the international community or the critical members of the international community is because Iran is highly suspected of developing atomic weapons.

Other issues that have triggered the invocation of natural law include human cloning (remember dolly – sheep – the first cloned mammal born in 1996), homosexuality, lesbianism, same-sex marriage, euthanasia, etc.

SELF-ASSESSMENT EXERCISE 2

Discuss the background to the decline and rebirth of natural law.

3.6 RESTATEMENT OF NATURAL LAW

The discourse on natural law would be probably incomplete without a consideration of the restatement of natural law by modern natural law theorists, for example, John Finnis (1940-). Finnis is a British lawyer and philosopher who is desirous of investigating the utility of natural law in contemporary society. According to Finnis, natural law is a set of principles of practical reasonableness to be utilized in ordering human life and human community in the process of creating optimal conditions for humans to attain the objective goods.

Finnis' restatement proceeds from a denial of the criticism of positivists that natural law theorists seek to derive an ought from an is. He de-emphasized the metaphysical character of natural law, perhaps, because of the severe criticisms natural law has suffered in the hands of positive law proponents.

Rather, the modern natural lawyers focus on the common good without which the society will be in disarray. He said that the normative conclusion of natural lawyers was not based on the observation of human behaviour or nature but they resulted from the reflective grasp of what is evidently good for all human beings. He contends that objective knowledge of what is good is possible owing to the

existence of objective goods which he calls 'basic forms of human flourishing'. He enumerated such objective goods to include life, knowledge, play, aesthetic experience, friendship or sociability, practical reasonableness, and religion. Finnis believes they are irreducibly basic.

4.0 CONCLUSION

With its humble beginning as a theological concept, natural law has matured to the stage where even the uninitiated, through the medium of rationality, can acquire its knowledge. Natural law flowered in the scholastic era but dwindled with the coming of Renaissance. The decline continued until positive law went beyond its limits.

This has been demonstrated by the horror of the 2nd World War, human rights violations and scientific excesses.

It is gratifying to note that natural law stands out as a tool that can readily be used against the excesses of positivism. In the absence of natural law, positive law would have a field day and that would be detrimental to the whole of the human race.

5.0 SUMMARY

This Unit consolidates on the preceding Unit 1 by considering the early origins of natural law. In pre-modern societies there was a union of secular and religious beliefs. Invisible forces were believed to be involved in directing the affairs of the physical world.

With monotheism replacing polytheism in Judeao-Christian tradition in Europe, such belief system bloomed. However, under the influence of Greek polytheistic belief system, rationalism flowered. It holds that the universe, being governed by intelligible laws, was capable of being understood by the human mind. Philosophers such as Socrates, Plato, Aristotle and Cicero made immense contributions in this regard.

In the Scholastic period, Christian fathers including St Augustine and St. Thomas Aquinas integrated rationalist and religious approaches to natural law. Aquinas

divided law into four groups, that is, eternal law, divine law, natural law and human law.

Renaissance in Europe saw the religious clout of the Roman Catholic Church waning and protestant theories blooming. It was under this atmosphere that Hugo Grotius secularized natural law by insisting that natural law was independent of divine law or command, and emphasizing that natural law would exist even where there was no God.

Renaissance ultimately led to the decline of natural law with David Hume, for example, criticizing natural law for attempting to derive an 'ought' from an 'is.'

However, the excesses of positivism created a set of circumstances favourable to the re-emergence or rebirth of natural law.

6.0 TUTOR-MARKED ASSIGNMENT

Natural law has a long history behind it. Do you agree?

7.0 REFERENCES/FURTHER READINGS

1. Akin Oyebode, Lecture Notes (unpublished: on file with author).
2. L.B. Curzon, Jurisprudence (London: Cavendish Publishing Ltd, 2nd Edition, 1995).

UNIT 3 MISCELLANEOUS ISSUES IN NATURAL LAW

CONTENTS

1.0 INTRODUCTION

This Unit 3 concludes the discussion on natural law. It will consider various types of law, obedience to law, natural law content in Nigerian law, and the critique of the doctrine.

Thomas Aquinas categorizes law into eternal law, natural law, divine law, and human law. The issue of what is just or unjust law, and how we are supposed to react to unjust law is viewed through the lenses of philosophers who were confronted with these issues in generations past.

Moreover, we will look at the quantum of natural law in Nigerian law through representative examples – social contract, separation of powers, sovereignty and fundamental human rights.

Lastly, we will consider some of the points that critics harbour against the doctrine of natural law.

2.0 OBJECTIVES

At the end of this Unit, you would be in a position to:

- Demonstrate the propriety or otherwise of obedience or disobedience to law
- Assess natural law content in Nigerian law.

3.0 MAIN CONTENT

3.1 TYPES OF NATURAL LAW

Thomas Aquinas (1224 – 1274) identified four kinds of law as eternal law; natural law; divine law; and human law. We shall look at them in turn.

(a) Eternal law (lex aeterna)

This is law that is known only to God though some blessed select few may perceive it. Through it God rationally directs all creatures. All creatures are ruled by the law. But note that the implication of man's possession of free will is his capacity to disobey or to act contrary to this law. Through the instrumentality of the law, God rationally guides all created things.

(b) Divine law (lex divina)

This is the law revealed in the scriptures. This law comes in handy when law discovered by human reason fails. In other words, it clears doubts in the mind of man as to the law of nature. By doing this, it provides a guide for human reason. Complementarily, this kind of law can be revealed to a select few – the prophets. In the Holy Bible, for example, God revealed certain laws or rules of conduct to the people of Israel through such prophets as Isaiah, Jeremiah, Ezekiel, etc.

(c) Natural law (lex naturalis)

Natural law is law that manifests man's participation or share in the workings of the cosmic law or the law governing the whole of the universe through the

medium of reason. Put differently, natural law is that small, still voice in a man's heart, the conscience, the 'small god' which exposes the difference between good and evil, and encourages one to do the former and to refrain from the latter. Thus, because natural law exists in every man, 'whatever is a means of preserving human life and warding off its obstacles belongs to the natural law.' In other words, self-preservation is natural law. Also, since everyone shuns ignorance, the search for knowledge is natural law.

(d) Human (lex humana)

This is law made by man, otherwise called positive law. It involves particular uses of the natural law. You recall that natural law is man's participation in eternal law. Amidst such participation, man enacts positive law for the governance of man and things. Such positive law may or may not conform to the law of God or natural law. Where it conforms, it is said to harmonize with the divine will of the creator or with the law of reason. Where, however, the reverse is the case, it is said to fail the test of natural law. In the extreme of cases, it may even be denied legal validity.

SELF-ASSESSMENT EXERCISE 1

The category of natural law is not closed. Do you agree?

3.2 OBEDIENCE TO UNJUST LAW

In the family of natural law, law is either just or unjust. According to Aquinas, a just law has three features:

(a) It must harmonize with the dictates of natural law, or 'ordered to the common good;'
(b) The law giver has not exceeded his authority; and
(c) The law's burdens are imposed on citizens fairly.

However, where a law fails any of the three criteria, it is unjust. A law may be unjust when it is contrary to human good, that is, when it has no redeeming value. An example is autocratic laws that violate or undermine basic human

rights of citizens. Also, an unjust law may be seen as law which is contrary to the divine good such as the law of a dictator forbidding the worship of the Almighty God, or abolishing freedom of worship.

Unjust laws are generally not binding on men. They are binding only in conscience. But what does this imply for the purposes of obedience and law enforcement? It is commonly said that such law does not warrant or command obedience. Such understanding is captured by or rendered in the Latin phrase lex *injusta non est lex ("an unjust law is no law"). The implication of saying that an* unjust law is no law is that the addressees of the law in question are not duty-bound to obey it. Because of the grave consequences of the failure of the people to obey a law, there is need to clarify the scope of this call to disobedience.

According to Bix, Aquinas did not use this phrase. All that he came close to saying was to the effect that any law that conflicts with the law of nature was a perversion of law. And Augustine is claimed to have said that an unjust law *seems not to be law. Other philosophers such as Plato, Aristotle, Cicero, and St.* Augustine are generally believed not to have made such a general statement as to whether an unjust law was law.

Bix, therefore offers a more reasonable interpretation of the phrase "an unjust law is no law" by stating that saying so means the unjust law is not law 'in the fullest sense.' He said that there are times when, because we are dissatisfied with the service rendered by a supposed professional man, we tend to deny his professionalism even though he has actually got formal, requisite qualification. For example, it is possible that a patient is the client of three medical doctors or lawyers. Having been served by all of them, he could be able to know who is more efficient than the rest or, at any rate, the best of them. Whereas the best of them would be described in superlative terms, the worst of them would be condemned or denigrated. It is in such circumstances that he could say: 'that man is not a medical doctor,' or 'that man is not a lawyer,' even though each of the men had done all that is legally required to be a member of their professions.

Against this background, when we say an unjust law is no law, it is not really to deny its validity but to state or protest its failure to have the same moral force as natural law.

Recall that Hegel's mystical theory asserts the moral superiority of the State over the individual. Hegel recognizes that the individual could claim no higher right than to obey the law of the State of which he forms an insignificant part because the State is the ultimate embodiment of morality. Therefore, obedience to the State is the highest form of morality.

In the same vein, remember the polytheistic Greek tradition of belief in many gods. Amidst this belief system, there was bound to be conflict between positive law and moral law. Where that happens, obedience was to go to positive law. Plato's Crito (featuring a conversation between Crito and Socrates) graphically represents Greek elevation of positive law over natural law. Note that Socrates in respect of whom the Crito was written was sentenced to death. He was convinced of the wrongness of the sentence and was even given the opportunity to escape. But he refused, preferring to suffer death penalty under the patently unjust positive law. According to Socrates, the only consolation for the victim in his shoes is to persuade the State to reform or change the law.

Note also the assertion of Thomas Hobbes to the effect that law is to be obeyed, even when unjust because the alternative is the chaos of the state of nature, of war of all against all.

Note again that Aquinas stated that a citizen is not bound to obey an unjust law if the law 'can be resisted without scandal or greater harm.' In other words, such law may be obeyed 'in order to avoid scandal or disturbance for which cause a man may even yield his right.' Thus, Socrates submitted to death penalty (by drinking hemlock) probably because he reckoned that his disobedience would adversely affect the society of his day.

This, indeed, is an important qualification to the general assertion or call to disobedience. What it means is that disobeying the law must not be a noisy affair; it must be done quietly. This is another way of saying that if such disobedience will breach the peace or cause disorder or disaffection, then it is inadvisable to have recourse to it. In other words, such disobedience is unnecessary where it would cause greater harm or evil than the unjust law. The morale here, therefore, is for the addresses of unjust law to endure it.

John Finnis asserts that the individual may exercise his right to discount unjust laws. However, he interpreted lex injusta non est lex as suggesting that an unjust law, though formally valid, does not meet the demands of natural law.

Note that the proposition that citizens should, nevertheless, obey an unjust law is consistent with practice across the globe. There are so many laws which citizens may have good reason to consider offensive to the moral conscience of the society yet they would have no immediate choice other than to obey the unjust law hoping, as Socrates advised, that law makers would be aroused to the consciousness of the unjustness of the law, and carry out requisite reforms.

SELF-ASSESSMENT EXERCISE 2

1. Discuss what is meant by the statement that an unjust law is no law?
2. In Nigeria, every citizen is at liberty to disobey an unjust law? Do you agree?

3.3 NATURAL LAW IN NIGERIAN LAW

Below, we will consider a few exemplars of natural law in the body of the legal system in Nigeria.

(a) Social Contract

In vindication of the assertion that natural law is universal, there are several layers of natural law in most, if not all, legal systems including the Nigerian legal system. In the case of Nigeria, no better document demonstrates this than the CFRN 1999.

Social contract is what we have come to accept as the basis upon which a person or group of persons could exercise political power over the other members of a political organization. It is a contract, or assumed to be so, between the rulers and the ruled. The underlying implication of this is that no authority can impose itself on the people in a manner inconsistent with the dictates of the social contract. Thus, S.1 (2) of the CFRN provides that

Nigeria shall not be governed, nor shall any person or group of persons take control of the government of Nigeria or any part thereof except in accordance with constitutional provisions.

The reduction of the principles of social contract into the CFRN is a clear demonstration of the people's right to the government of their choice and a bulwark against persons who might wish to take over the reins of government by force or by unconstitutional means.

Note that the political rulership of Nigeria from 1966 to 1999 Nigeria was largely aberrational. In the period, military dictatorship flowered under the pretext of promoting the common good. It so turned out that such promise was a decoy to perpetrate or promote the interests of a few individuals. But it must be noted that even a benevolent dictatorship does not cure itself of the stigma that it is ruling by unconstitutional means. However, you can contrast this position with Kelsen's theory of revolution. He had propounded that revolution occurs when there is a change of government in a manner not contemplated by the pre-existing legal order. Such revolution has the effect of ratifying or legitimizing the illegality of a coup. But from the natural law perspective, revolution itself is another form of aberration which, more often than not, does not stand the test of time.

(b) Separation of powers

Another trace of natural law is separation of powers. According to John Locke and Montesquieu, the doctrine of separation of powers is to the effect that:

(i) The same persons should not be part and parcel of more than one of the three arms of government. In other words, if a person is a member of the Legislature, he should not simultaneously be a member of either the Executive or the Judiciary;
(ii) An arm of government should not interfere in the affairs of any other two arms of government. Put differently, it means, for example, that a member of the executive should do only those things that are within the schedule of duties of the executive, and desist from controlling or interfering with

the legislature and the judiciary in the performance of their assigned functions; and

(iii) One arm of government should not exercise the functions of another arm, that is, the judiciary, for example, should neither perform legislative nor executive roles.

Thus, S.6(6)(b) of the CFRN 1999 provides for the Legislature (National Assembly), the Executive, and the Judiciary. See the case of Kayode v. The *Governor of Kwara State*[5] *where the Court of Appeal had declared that:*

> In a presidential system of government, which Nigeria is currently operating, there are three arms of Government: the Executive, the Legislature and the Judiciary. The functions of each are clearly defined and set out in the Constitution which is the grundnorm. Any action taken or to be taken by each arm must be within the provision of the said Constitution or else it will be declared ultra vires the powers given to that arm of Government.

(c) Sovereignty

Next is sovereignty. Sovereignty originally propounded by Bodin belonged to the State and, most important, to the symbol of the State such as the head of State, president, prime minister, etc. But in its modern rendition, sovereignty now belongs to the people. For example, S.14 (1)(a) declares sovereignty to belong to the people of Nigeria from whom government through the CFRN derives all its powers and authority. Note that this perspective is consistent with modern international law where the sovereign's sovereignty has been displaced by people's sovereignty.[6]

(d) Fundamental Human Rights

The last point is on fundamental human rights. In addition to States'

5 [2005] 18 NWLR (Pt.957) 324 at 352.

6 W. Michael Reisman, "International Law after the Cold War," 40 The American *Journal of International Law 869 (1990).*

subscription to international human rights instruments, domestic legal systems equally have a pride of place for human rights norms. Chapter IV of the CFRN 1999 focuses on human rights of citizens including the right to life (S.33), right to dignity (S.34), right to personal liberty (S. 35), right to fair hearing (S.36), right to privacy (S.37), right to freedom of thought, conscience and religion (S.38), right to peaceful assembly and association (S.40), right to freedom of movement (S.41), right to freedom from discrimination (S.42), and right to own property (S. 43).

Note, however, that there is no absolute right without corresponding duty. So, my right to stretch or swing my hand around is necessarily limited by my duty not to assault of commit battery against the person of my neighbour. Also note S. 44 (on compulsory acquisition of property) which limits the application of S. 43. It is a manifestation of the privilege of public interests over individual interests. Finally, note S. 45, which permits derogation from all the rights in the interest of defence, public safety, public order, public morality, public health or for the purpose of protecting the rights and freedom of other persons.

3.4 CRITIQUE OF NATURAL LAW DOCTRINE

The doctrine of natural law has been criticized for several reasons including the following:

(a) Reliance on Metaphysical Validation

Natural law is a law built around idealism. Knowledge is acquired by means of metaphysical or transcendental inquiry. In the Age of Science, or Renaissance, many philosophers severely criticized the natural law doctrine for its inability to prove or demonstrate the truth of its claims. In other words, natural law was condemned for its unscientific methodology. For example, David Hume said that natural law is real only in the sense that some individuals entertain the feeling that it exists. He believed it was a figment of the imagination of fertile minds. He contended further that its truths cannot be asserted or demonstrated meaningfully, and concluded that natural law attempts to derive an ‘ought’ from an ‘is.’

Moreover, natural law was not spared by the proponent of utilitarianism, Jeremy Bentham. In fact, he developed his theory upon the pedestal of denigrated natural law. He had described natural law as nothing but a phrase and natural rights as nonsense upon stilts. He had argued, inter alia, that the spread of natural law would undermine the fabric of sovereignty and fan the embers of rebellion. However, note that although Bentham's utilitarianism was geared towards the satisfaction of the happiness of the greatest number, his felicific calculus (for measuring pain and pleasure) has been said to be unscientific and his utilitarian theory has even been criticized for belonging more to the family of natural law than to that of positive law. According to Schumpeter, utilitarianism has about it an aura of the 'universal and immutable' values associated with classical natural law.

(b) Proviso to Universality

Danish jurist, Alf Ross (1899-1979) mounted a virulent attack on natural law doctrine in his On Law and Justice (1958). According to him, the metaphysical speculation underlying natural law is totally beyond the reach of verification. He said that the doctrines of natural law are neither eternal nor immutable. To him, natural law has been utilized to defend every conceivable kind of demand, slavery and fraternity. It is in this light that Friedmann notes that 'natural law has at different times been used to support almost any ideology'. Of course, recall that Ross had said of natural law as follows:

Like a harlot, natural law is at the disposal of everyone. The ideology does not exist which cannot be defined by an appeal to the law of nature.

The observation by Friedmann on the flexibility of natural law ancient philosophers have made us to believe is eternal, unchanging and everlasting is made manifest in a survey of some ancient civilizations (such as Egypt, India, Mesopotamia, China, Greece and Rome) where inequality and slavery were accommodated as part and parcel of the doctrine of natural law.

Lastly, Ross argued that the metaphysical postulates of natural law are no more than 'constructions to buttress emotional attitudes and the fulfilment of certain needs.'

(c) Diversity of Moral Opinions

We have said that natural law represents man's participation or share in the workings of the universe with the aid of his reasoning power. We asserted that natural law is that small, still voice in a man's heart, the conscience, the 'small god' of a man. However, we realize the fact that man is different from man. Because one person's background, status, belief system, etc, is different from another's, their appreciation of or participation in natural law is bound to be different. Therefore, there is no oneness of natural law. In other words, there is no unity within the family of natural law. It is more or less a divided house since consensus is very unlikely.

But we should realize that there are some themes of natural law which (though few) would ordinarily elicit same and universal response from all. John Finnis may have enumerated them in his objective goods.

4.0 CONCLUSION

The Unit focused on certain miscellaneous issues relating to the types of natural law, obedience of unjust law, natural law content in Nigerian law and some criticisms against the law.

Amidst all this, the issue of obedience or disobedience of law is noteworthy. This is especially so in our political environment where many citizens perceive certain laws to be not just bad but incurably so for catering for the interest of a few to the detriment of the most, for example, the practice whereby the Revenue Mobilisation Allocation and Fiscal Commission (RMAFC) routinely (many times in a year) reviews upward the salaries and allowances of political office holders without a commensurate increment in those of workers or employees. Cases of a law specifically meant to benefit a few interests to the detriment of every other interest abounded in the dark days of military absolutism in Nigeria. Note that democratic Nigeria is as vulnerable to such unjust laws as military era.

The reaction of those at the receiving end of such laws could be felt in forms of demonstration, riot, strikes, etc. But how should they conduct themselves towards such laws in terms of obedience and disobedience?

Positivism says the law must be obeyed despite its moral turpitude. However, natural law doctrine disagrees. But its disagreement cannot be taken too far because disobedience could lead to anarchy and chaos. And, as the example of Socrates shows, an unjust law still needs to be obeyed even on the pain of death if, otherwise, the society would be destabilized.

Finally, note that obedience to law is required of everybody. Whoever does not agree with it can, however, request reform of the law or challenge its legal validity through peaceful protests or in courts.

5.0 SUMMARY

This Unit commenced with a look at the different types of law such as eternal law, divine law, natural law and positive law. It, thereafter, considered the meaning or explanation of the statement that an unjust law is no law. A law is unjust if:

it is inconsistent with the common good;
the legislator exceeds his authority; and
the citizens are unevenly yoked by the law.

In consideration of the positions canvassed by various legal philosophers ancient and modern, we found that a law is said to be unjust not because it is invalid but because it does not satisfy the moral demand of natural law. Secondly, it is equally accepted that the phrase is not an invitation to disobedience except such disobedience will not destabilize the order of the society.

Thereafter, we examined some areas where natural law doctrines can be found in the Nigerian legal system. Such areas include doctrines of social contract, separation of powers, sovereignty and fundamental human rights.

We rounded off the discourse with a look at some of the shortcomings of natural

law.

6.0 TUTOR-MARKED ASSIGNMENT

Examine the statement that there is no natural law content in Nigerian law.

7.0 REFERENCES/FURTHER READINGS

1. Brian Bix, Jurisprudence: Theory and Context 66 (US: Carolina Academic Press, 3rd Edition, 2004).
2. L.B. Curzon, Jurisprudence 37 (London: Cavendish Publishing Ltd, 2nd Edition, 1995).

LAW 516 JURISPRUDENCE AND LEGAL THEORY II

MODULE 2 POSITIVE SCHOOL OF LAW

Unit 1 Legal Positivism: General
Unit 2 Legal Positivism: John Austin
Unit 3 Legal Positivism: Hans Kelsen

UNIT 1 LEGAL POSITIVISM: GENERAL

CONTENTS

1.0 INTRODUCTION

Standing in stiff opposition to natural law school of jurisprudence is legal positivism. Legal positivism stands for almost everything that natural law school advocates. Legal positivism is a theory of law that emphasizes the 'is' as against the 'ought.' What this means is that it seeks to adopt the scientific approach to the study of law by focusing only on phenomena that can be experimented, observed, or demonstrated. Thus, it is descriptive, and not prescriptive.

Within the big family of legal positivism, there are sub-theories with which outstanding individual positivists are peculiarly identified. Such sub-theories include the command or imperative theory of law (associated with John Austin), and Grundnorm (connected with Hans Kelsen). Another positivist theory but which is not discussed along with classical positivism is utilitarianism, which is identified with Jeremy Bentham. It would be considered in a separate Module.

This Unit shall look at the constituents of positive law. Against this background, the Unit will examine the common boundary between positive law and natural

law. Specifically, we shall consider the Hart-Fuller debate on the relationship between positive law and natural law. Lastly, we will look at the impact of positive law on natural law and conclude with a critique of positive law.

2.0 OBJECTIVES

At the end of this Unit, you will be able to:

- Examine the contents of positive law
- Demonstrate the disparity between positive law and natural law

3.0 MAIN CONTENT

3.1 SCOPE OF LEGAL POSITIVISM

The word 'positivism' derives from positum, the part participle of ponere, which means 'to put.' It means that which is formally laid down or affirmed by man. It contrasts with natural law whose existence derives from metaphysical or transcendental roots.

Positivism is the rejection of the normative and the embrace of empiricism. Normativity has to do with idealism. This mode of thought commences its inquiry from an idea before it proceeds to matter. It is metaphysical and transcendental. It is the tool utilized by natural law. On the other hand, empiricism, a mode of thought of positivism, is a way of thinking which emphasizes materialism. Knowledge validated in sense experience is the basis of positivism. For such validation, it relies on experimentation or observation. It is descriptive; it describes what is as it is and no more. Above all, it is scientific.

Natural law is animated by idealism in the same way that positivism is propelled by materialism. In legal positivism, however, a metaphysical explanation of reality is denigrated in preference for the scientific method. Legal positivism believes it is the height or apogee of legal thought. According to Comte (1798-1857), evolution of human thought has passed through three stages: theological, metaphysical and positivistic. In the first stage, knowledge is acquired or validated by reference to religion – such as Christianity and Islam. For example, before the Renaissance, the Church monopolized knowledge to such an extent

that natural law was adorned with its garment until the 16th century when Hugo Grotius secularized natural law.

In the second stage, knowledge is based on idealism, on events that have no material reality. In the third and last stage, knowledge is scientific, that is, knowledge acquisition or dissemination is validated by the processes of observation, experimentation, etc. The natural sciences are the natural habitat for such methodology. Note that the emergence of social sciences was an attempt to replicate the approach of the natural scientists in the study of human behaviour.7

Dennis Lloyd observes that the real impetus to the positivistic approach to learning can be traced to the Renaissance with its emphasis on the secular studies of science and humanism.8 In relation to law, efforts to place legal study on a scientific or unbiased pedestal or footing led many early legal positivists to create strictly empirical way of understanding or studying law. Such early advocates of legal positivism included Jeremy Bentham (1748-1832) and John Austin (1790-1859). Note that these advocates benefited from the philosophers and political theorists of earlier age such as Thomas Hobbes (1588-1679) and David Hume (1711-1776). The fruits of the legal positivistic doctrine ripened in the 18th century when the laws governing the physical world (both animate and inanimate) were separated from those governing human conduct.

There are five categories of the possible meanings of legal positivism as follows:

(a) The contention (in the view of Jeremy Bentham and John Austin) that laws are commands of human beings, the command of a superior to an inferior who habitually obeys the former.

(b) The proposition that there is no necessary link between morals and law. Proponents include Hume, Bentham, Austin, Kelsen and Hart. In other words, legal positivism is a body of law which exists independently of mores, moral norms or moral code. It asserts that despite the existence of a relationship between law and morals there is no necessary connection between them. This

7 L. B. Curzon, Jurisprudence (London: Cavendish Publishing Limited, 1998).

8 Dennis Lloyd, The Idea of Law Chapter 5 (London: Penguin Books, 1987).

is another way of saying that the nexus between the two cannot be taken for granted because each can exist in spite of the other.

(c) The contention (according to Kelsen) that the analysis (or study of the meaning) of legal concepts is (i) worth pursuing and (ii) to be distinguished from historical inquiries into the causes or origins of laws, from sociological inquiries into the relation of law and other social phenomena, and from the criticism or appraisal of law whether in terms of morals, social aims, "functions", or otherwise.

(d) The contention (according to Kelsen) that a legal system is a "closed logical system" in which correct legal decisions can be deduced by logical means from predetermined legal rules without reference to social aims, policies or moral standards.

(e) The contention that moral judgements cannot be established or defended, as statements of facts can, by rational argument, or evidence or other proof.9

In (a) above, legal positivism is expressed in the form of the capacity of a superior to issue commands to be obeyed by inferiors. Popularly known as the command or imperative theory, it was popularized mainly by John Austin. We shall deal with Austin in Unit 2. However, our discussion of Jeremy Bentham shall be within the context of the utilitarian theory in Module 5.

In (b), legal positivism is concerned with the relationship between man-made law and morals. It states that notwithstanding the degree of relationship between them, each is separate and independent. As Hart says, there is no necessary connection between law and morals. It argues that positive law is to be studied to the "total exclusion of any law transcending the empirical reality of the existing legal system." Thus, morality cannot be mixed up with positive law let alone be used as a litmus test for the validity of the latter because it is metaphysical or transcendental. (e) is closely associated with (b).

9 Amaechi Uchegbu, The Jurisprudence of the Nigerian Legal Order 112-113 (Lagos: Ecowatch Publications Limited, 2004).

(c) In his desire to purify the impurities contained in positive law, Kelsen developed the Pure Theory of Law. In summary, he sought to totally separate not just moral issues but also sociological and historical character of law from man-made law. We shall dwell on the Pure Theory of Law in Unit 3 of this Module. Note that (d) is connected to (c).

In view of the above summary of the different meanings of legal positivism, we shall be discussing, in the rest of the Unit, such issues as the impact of positive law on natural law, convergence of positive law and natural law, separateness of positive law from natural law, Hart-Fuller debate, and the critique of positive law.

SELF ASSESSMENT EXERCISE 1

1. What is positivism?
2. In what possible senses can positive law be understood?

3.2 IMPACT OF POSITIVE LAW ON NATURAL LAW

The impact of the rise of positivism on the doctrine of natural law was great. Hitherto, natural law was accepted or almost accepted as given, as self-evident, demonstrable by reason. But the trenchant criticism of positivism has made it like a mere pretentious name for moral rules. According to David Hume, justification for such rules is to be found in certain aims of life determined not by reason but by human desires or passions. In other words, moral values are a response to the existentialist needs of humanity the same way as necessity is the mother of invention. Put differently, passion or emotion is the basis of morality, not reason.

3.3 CONVERGENCE OF POSITIVE LAW AND NATURAL LAW

Despite such impact, there is no escaping the fact that there are instances where positive law and natural law (or morals/religion) all converge because they all embody norms comprising obligations and rights, for example, their common prohibition of murder, rape, etc. Also, in imposing certain standards of behaviour, positive law and natural law reinforce and supplement each other. For example, the moral duty not to harm another manifests as the Law of Tort; the duty to honour promises is expressed in the Law of Contract; the duty not to create

unjustified hazards for another can be found in positive law providing for rules on speed limit, traffic sign, roadworthiness, etc. Note also that Chapter II of the CFRN 1999 represents a bridge between positive law and natural law.

3.4 SEPARATION OF POSITIVE LAW FROM NATURAL LAW

Notwithstanding the convergence between positive law and natural law, there are so many instances in which their streams do not flow together. Legal positivism revolves around the belief, assumption or dogma that the question of what is the law is separate from, and must be separated from, the question of what the law should be.10 John Austin captures this worldview as follows:

> The existence of law is one thing; its merit or demerit is another. Whether it be or be not is one enquiry; whether it be or be not conformable to an assumed standard, is a different enquiry. A law, which actually exists, is a law, though we happen to dislike it, or though it varies from the text, by which we regulate our approbation and disapprobation.

Legal positivism believes that social institutions can be studied objectively, that is, in a manner devoid of passion, emotion or bias. It does not deny that certain laws may be evil or condemnable but it insists that the quality of the law does not affect its validity. In other words, legal positivism is saying that the question of the goodness or badness of the law must be kept separate from the validity (that is, whether the law has been made in accordance with the requirements of the legal system in question) of the law.

Legal positivism distances itself from morality because morality, which advertises itself to be universal, certain and objective, is reality marked or marred by relativism, uncertainty and subjectivism.

There is, therefore, the need for distinction between analytical jurisprudence (positive law) and normative jurisprudence (natural law). Whereas analytical jurisprudence focuses on the basic facts of the law, its origin, existence and

10 Brian Bix, Jurisprudence: Theory & Context 33 (Durham, North Carolina: Carolina Academic Press, 2004).

underlying concepts, normative jurisprudence concerns itself with the goodness or badness of the law.

Legal positivists accuse natural law theorists of deriving an 'ought' from an 'is.' The explanation of this accusation is rendered by Chinhengo as follows:

> The question of what the law ought to be is an important question of morality, since it is ultimately based on the value judgements of persons in society which are properly reached at after the exercise of reason. The goal which it is intended to achieve through law is also identified through reflection, and may be objectively discovered from the attitudes or preferences of all moral persons in society. From this they deduce what the desired state of perfection and the moral principles leading to it should be. On this basis they decide what the law ought to be which will lead to the desired result.11

In response to the insistence of naturalists that natural law occupies a pride of place in the legal universe, towering over and above positive law, legal positivists often draw the attention of the former to the difference between the lex lata (the law as it is) and delege feranda (the law as it ought to be). Positivists maintain that there must be a separation of the 'is' from the 'ought.' To positivists, one cannot validly deduce "ought" from "is." Normative statements cannot be garnered from merely factual statements.

The 'is' must be taken or studied as it is. This must serve as a necessary base for the legal researcher who is interested in legal reform, in advocating for a change or review of the law. The utility of this approach is that it allows for clarity of legal thought.

Note that natural law proponents do not make such distinction. Stressing the unity of law, they believe that it is either there is law or there is not. If there is law, it must, to be valid, meet the metaphysical, transcendental standard of natural law.

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11 Austin M. Chinhengo, Essential Jurisprudence 19 (London: Cavendish Publishing Limited, 1995).

Note also that positivists believe that natural law is an impurity or infection that must be quarantined out of positive law. It is in a bid to do this that there is a separation of the 'is' from the 'ought,' a distinction that seeks to make law value-neutral, devoid of any moral underpinning, emotion or passion. According to Kelsen, in his General Theory of Law and State (1945):

> 'Pure theory of law' is so-called 'because it only describes and attempts to eliminate from the object of the description everything that is not strictly law: its aim is to free the science of law from alien elements.'

Bear in mind that it is the spirit of such elimination that has informed several doctrines in the family of positive law. Thus, the command theory or the imperative law theory is associated with John Austin, utilitarianism with Jeremy Bentham and John Stuart Mill and, of course, Pure Theory of Law with Hans Kelsen.

SELF ASSESSMENT EXERCISE 2

1. To what extent is positive law convergent with natural law?
2. How have the proponents of positive law advanced the separateness of positive law from natural law?

3.5 THE HART-FULLER DEBATE

It is important to consider, howbeit briefly, the academic exchanges between the proponents of legal positivism as represented by H.L.A. Hart and those of the natural law school represented by Lon Fuller. The gravamen of such academic discourse, usually tagged Hart-Fuller debate is to be found in the Harvard Law Review 1958.

Curzon identifies the background of the debate as the atrocities committed by Germany during the 2nd World War. Under the National-Socialist regime (1933-1945), dictatorship reigned. There were abuses of power, massive violations of human rights, enacting of privative laws and ouster clauses (which hindered the courts from adjudication).

At the end of the war, there were concerted efforts by German jurists to cleanse the German legal system of any association with such dictatorship. Radbruch (1878-1949) – who was Minister of Justice under the Weimar Republic – wrote a book entitled Five Minutes of Legal Philosophy (1945) wherein he 'converted' from legal positivism to natural law. He wrote that:

> Preference should be given to the rule of positive law, supported as it is by due enactment and State power, even when the rule is unjust and contrary to the general welfare, unless the violation of justice reaches so intolerable a degree that the rule becomes "lawless law" and must therefore yield to justice.

The transformation or transfiguration of the erstwhile die-hard positivist and Minister of Justice influenced many and brought into sharp focus the need to re-examine the doctrine of legal positivism in a dictatorship.

Although Hart sympathized with Radbruch, he insisted that the law is the law notwithstanding its failure to meet the demands of external moral criteria. In *Positivism and The Separation of Law and Morals (1958), he observed that that* the law is evil is separate from the question as to whether it ought to be obeyed. Note, however, that Hart did not support the evil of the Nazi regime which he described as 'hell created on earth by men for other men.' But he insisted that it was wrong to deny a law duly made in accordance with rules of the legal system in question simply because it results in abuses and atrocities.

Fuller responded in his Positivism and Fidelity to Law – A Reply to Professor *Hart (1958). He emphasized the wrongness of the position taken by Hart. To* him, law must possess certain characteristics of 'inner morality' if it must be classified as law. In Nazi Germany, nothing existed to which the title of law might be applied correctly because the so-called laws were inherently evil. He gave examples of the characteristics of such laws as retroactivity of decrees, execution without trial of dissidents in 1934, and total indifference to human rights and civilized conduct. He posited that it was not unfair to the positivist philosophy to say that it never gives any coherent meaning to the moral obligation of fidelity to law.

Hart replied by reaffirming his stance. Legal system may show some concerns to justice or morality but it does not follow that a criterion of legal validity must include, expressly or by implication, any reference to justice or morality. A law remains law no matter how morally iniquitous. Law and morality are not interchangeable.

However, Hart recognizes the necessity for 'salient characteristic' of law ('inner morality') in his Concept of Law. Thereafter Fuller enumerated the minimum content of law – what a law worthy of its name should contain in order to be called law. He concluded by stating that a law lacking in internal morality loses the essence of true law.

3.6 CRITIQUE OF LEGAL POSITIVISM

Legal positivism is appreciated for enabling us to differentiate between the law as it is and the law as it ought to be. Such approach allows for logic and coherence. However, it is criticised on many grounds including:

(a) That it is a mere search for facts without any unifying frame of reference. The argument is that positivists are concerned only with the analysis of the coherent and logical sequence of the basic facts of the law, its origin, existence and underlying concepts without considering the purpose for which the institution of law exists. But positivists retort that their search for facts is informed by the motive of classification and interpretation in order to pave way for the possible emergence of universal concepts that would be of immense assistance in legal discourse.

(b) That it operates outside its social setting. Law is a social enterprise meant to govern human conduct, to rule a society. However, where, as the positivists insist, such law is imposed on the society in vacuo, that is, without consideration of the interests of the people it is made to govern, then the law becomes an unruly horse. Where law assumes this dimension, it is no more than an alien superstructure which will naturally excite the hatred and opprobrium of its subjects.

(c) More often than not, positive law disregards or even tramples on the basic rights of people. It is in this wise that legal positivists have been accused of using their theory to fan the embers of authoritarianism, despotism, or dictatorship in several States. For example, such was the case in Nazi Germany which, pursuant to its positive laws, permitted or authorized the extermination of six million Jews. The Hart-Fuller debate reveals this much. Coming back home to Africa, positivism has been fingered as a major culprit in the gross violations of human rights of African peoples by several dictatorial governments. A quintessential representation of this scenario was Nigeria under military dictatorships. Through their decrees and edicts, several military governments abused the human rights of citizens including the rights to life, human dignity, property and good governance.

However, positivists have responded that positivism or those influenced by it are not necessarily authoritarian or totalitarian. They allude to the fact that there have been positivist jurists who were committed to socio-political and economic reforms or progress. Such jurists included Jeremy Bentham and John Stuart Mill who advocated utility as the foundation of any law. Ditto for Austin who, though a positivist, was equally a utilitarian. Positivists contend further that the opponents of positivism are not necessarily libertarians. They cite Del Vecchio's apologia for Italian fascism as an example of natural law doctrine placed at the service of despotism. We can see the contemporary version of this when supposed liberals or radicals in government or leadership positions fail to impact their liberalism or radicalism in governance. They instead choose to wave their positivist flag to deny compatriots of their humanity and dignity.

(d) Moreover, ignoring the 'ought' in the law has the effect of draining the law of values. It is basic that in societies, there are certain values or virtues that people hold dear, values they ordinarily would expect would be given expression to by law but, with the value-neutrality of positive law, this is rendered impossible. Where this is the case, the purpose of the law will be defeated. Many may not have too many objections to the insistence by legal positivistic doctrine that law and morals must be separated but the Hart-Fuller debate demonstrates the depth of the disagreement between

legal positivism and natural law doctrine.

4.0 CONCLUSION

In this Unit, we examined the scope of legal positivism, the impact of positive law on natural law, the convergence of positive law and natural law, the separation of positive law from natural law, the Hart-Fuller debate, and the critique of legal positivism.

To the extent that positive law is scientific, that is, by reason of being seen, observed and felt, it meets our expectation of reality. On this score, nobody may validly oppose the insistence of positivists that the law as it is must be separated from the law as it ought to be.

However, in not caring about the contents of the law, a development that has encouraged all sorts of excesses and abuses, it is believed to have taken law out of context, out of the social setting. Be it noted that a law that does not consider or take into consideration the interests and even passion of the people it is meant to regulate is viewed as an alien imposition.

5.0 SUMMARY

In this Unit, we examined the general scope of positivism. Positivism emerged as a reaction to the metaphysical, transcendental and unscientific methodology of natural law. Positive law, its product, is man-made law.

We noted that the coming of positive law impacted on natural law negatively. Such outcome was as a result of ceaseless attacks by the likes of Jeremy Bentham and David Hume.

Despite the cat-and-dog relationship between positive law and natural law, there are circumstances in which they share similar interests such as when they similarly regulate the duty not to injure one’s neighbour, the duty to keep promise, the duty not to expose others to life-threatening risks, etc.

We equally considered the crux of the grievance that positive law adherents have

against natural law. Positivists believe that natural law philosophers becloud clarity of thought when they fail to admit the necessary separation between positive law on the one hand and natural law on the other. In doing so, natural lawyers seek to derive is from an ought. It is against this background that we considered the Hart-Fuller debate.

Finally, we looked at the criticisms against positive law including its value neutrality and human rights abuse.

6.0 TUTOR-MARKED ASSIGNMENT

Against the background of the Hart-Fuller debate, comment on the assertion that the criticism of legal positivism is unwarranted.

7.0 REFERENCES/F URTHER READINGS

1. Amaechi Uchegbu, The Jurisprudence of the Nigerian Legal Order (Lagos: Ecowatch Publications Limited, 2004).
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UNIT 2 LEGAL POSITIVISM: JOHN AUSTIN (1790-1859)

CONTENTS

1.0 INTRODUCTION

In continuation of the positivist perspective to law, the theory of John Austin is the focus of this Unit. John Austin, a die-hard positivist, was the first Professor of jurisprudence at London University. He was equally a utilitarian and a friend to the proponents of the utilitarian school – Jeremy Bentham and John Stuart Mill.

John Austin saw law as the product of an identifiable superior being to whom the rest of the society must pay heed. To him, law was handed down neither by a transcendental being nor by a group of persons but by the uncommanded commander. His theory, therefore, rests on the trilogy of sovereign, command and sanctions.

This Unit will look at John Austin's conception of law, the trilogy, and the critique of his theory.

2.0 OBJECTIVES

At the end of the discourse in this Unit, you would be grounded in the:

Positivistic analysis of law from the perspective of Austin;
Assessment of the trilogy of sovereign, command and sanctions; and

Applicability of his theory to Nigerian law.

3.0 MAIN CONTENT

3.1 CONCEPT OF LAW

John Austin was a disciple of Jeremy Bentham. So, he was a utilitarian. Thus, according to him, 'the proper purpose or end of a sovereign-political government is the greatest possible advancement of human happiness."

Because the works of Bentham were not published until a century after his death, the task of expounding the command theory of law fell on his shoulders. In his *The Province of Jurisprudence Determined (1832), Austin sought to delimit the* scope of jurisprudence. To Austin, jurisprudence is concerned with 'positive laws or with laws strictly so-called, as considered without regard to their goodness or badness'. Positive law or man-made law is set by political superiors to political inferiors. John Austin's theory has no room for moral law whose basis cannot be established without reference to the metaphysical or transcendental. Thus, regarding the morality of law, he states that the existence of law is one thing; its demerit another. In other words, the content of law should not determine its status as law. Put differently, the content of the law should be separated from the form of the law itself.

His command or imperative theory of law derives its name from the manner in which he defined law. According to him, law is the command of a sovereign, the command of the uncommanded commander, a command issued by a political superior to whom the majority of members of society are in the habit of obedience, and which is enforced by a threatened sanction. From these strings of definitions emerged the trilogy of sovereign, command and sanction.

3.1.1 Types of Law

He broadly categorized law into two types as follows:

a. Laws improperly so called; and
b. Laws properly so called.

a. Laws improperly so-called: This comprises laws by analogy and laws by metaphor:

   i. Laws by analogy: These are "rules made and enforced by mere opinion by an indeterminate body of men in regard to human conduct, such as the law of honour." He gave International Law as example of this group.
   ii. Law of Metaphor: These are laws observed by lower animals or laws determining the movement of inanimate bodies.

b. Laws properly so-called: These laws are general commands made up of laws of God, set to human beings, and laws set by men to men. Laws set by men consist of "laws strictly so called" and laws not strictly so-called:

   i. Laws not strictly so-called: These are laws set by men not as political superiors nor pursuant to a legal right. They are not the commands of a sovereign and there are no sanctions imposable upon violations. An example of this category of law is Constitutional law.
   ii. Laws strictly so-called: These are laws made by a political superior for the guidance of political inferiors.

3.1.2 Command Theory and International Law

International law is a body of rules governing States, international organizations and individuals. It is different from municipal or domestic law in several respects. Whereas international legal system is primitive or poorly developed, domestic legal system is civilized or highly developed. Manifestations of this include absence of a super-sovereign or law-giver, the existence of collective responsibility, and its incapacity to possess institutions of governance similar to the ones available in domestic legal systems.

In view of the foregoing, Austin concluded that international law was no law but rather an act of comity by States. At best, he defines or describes international law as international positive morality.

3.2 TRILOGY OF SOVEREIGN, COMMAND AND SANCTIONS

(a) Sovereign

Sovereignty is the exercise of ultimate authority over persons and groups within the territory of a State. According to Bodin (1530-1597), it is "the highest power over citizen and subject unrestrained by law." Behind every sovereignty is a sovereign. But who is the sovereign? In describing a sovereign, Austin said:

> If a determinate human superior, not in the habit of obedience to a like superior, receives habitual obedience from the bulk of a given society, that determinate superior is sovereign in that society.

With this, Austin meant by a sovereign a person or group of persons who are in a superordinate position over the rest who must be subordinate. It is a pyramidal relationship with the law giver occupying the apex and the subjects the bottom.

Note that Thomas Hobbes had defined a sovereign as "the sole legislator … having power to make and repeal laws … when he pleaseth." Jeremy Bentham offered a similar definition: law is as "conceived or adapted by the sovereign in a State." On his part, Bodin saw a sovereign as 'he who makes law for the subject, abrogates the law which is already made, and amends obsolete law.'

Note that in contemporary times, sovereignty is, depending on the circumstances, shared amongst the State, its organs and its people, with that of the people ultimately holding sway. Thus, under Chapter II of the CFRN 1999, sovereignty belongs to the people. And Reisman talks about people's sovereignty displacing the sovereign's sovereignty.

A sovereign State is a State that is independent of both internal and external control. The sovereign – whether comprising an individual or a group of individuals – is the repository of the ultimate legal authority in the State. How then do we identify a sovereign? Austin provides an answer as follows:

> If a determinate human superior, not in a habit of obedience to a like superior, receives habitual obedience from the bulk of a society, that determinate superior is sovereign in that society, and that society

(including the superior) is a society political and independent.

Therefore, the existence of a sovereign implies an independent State or a political society. In other words, a sovereign ceases to be such where he owes allegiance to some other superior authority. The implication of this position for a federation like Nigeria under the military is, as Elegido has suggested, that a military governor or administrator of a State in the Federation will not be a sovereign and the State will not be an independent political society because the governor or administrator is in the habit of obeying the head of State. Whether or not the same can be said of the State in a civilian democracy is debatable.

The governor may be said to be sovereign in the State, at least, within the scope of the Concurrent List. Such sovereignty may be said to be strengthened by S. *308 of the CFRN 1999 which grants immunity to the governor and his deputy* from legal process during their incumbency. However, the fact that the CFRN unduly invests too many powers in the Federal Government to the detriment of the States (and the federal system of government) may undermine such proposition. This view appears to be corroborated by international law which recognizes the sovereignty and immunity of only the symbols of a federal government. Thus, in the money laundering case against the then incumbent governor of Bayelsa State, Alamieyeseigha, the Bow Street Magistrate Court ruled that he lacked sovereign immunity in November 2005.

According to Austin, the sovereign is characterized by illimitability, and unity or indivisibility. The former means that the sovereign is the supremo on whom no superior could impose any legal duty. In other words, the powers of the sovereign are not subject to legal limitation. Therefore, he said that 'supreme power limited by positive law is a flat contradiction in terms.' Regarding the feature of unity, Austin was of the view that sovereignty should be exercised by a single person or a body of persons. However, the identity of the sovereign proved difficult for Austin as he variously identified the sovereign as the Crown, the Queen, Lords and Electorate.

(b) Command

Austin perceived law as a command issued by a political superior to whom the

majority of members of society are in the habit of obedience, and which is enforced by a threatened sanction.

By using the term 'command,' Austin meant to convey the superhuman nature or the superiority of the commander or the sovereign over other (inferior) persons who must obey such commands, and the compulsion of such commands which include laws, rules and regulations. And, from the point of view of positivist aversion to natural law, such commands exclude moral law.

Therefore, if a rule or law does not proceed from such commander then it is no law despite its goodness. On the other hand, if the sovereign enacts a law, it is law and a valid one at that irrespective of its badness or moral turpitude or blameworthiness. This does not mean that every law must always, in fact, issue out from the commander because, by the principle of subordinate legislation, he can delegate his subordinate to do so. Where this is the case, the force of the law does not derive from the subordinate but from his principal.

But what is the status of existing laws commanded by deceased sovereigns who were in office before the current sovereign? To whom is the legitimacy or validity of such law attributed? Austin's response is that the current sovereign *tacitly commands the laws to the extent that he permits judicial enforcement of* the laws. We can locate a comparator in the Pure Theory of Law where Kelsen said that in relation to revolution that, upon the successful overthrow of a previous government, the incumbent government is deemed to have made pre-existing laws or that the pre-existing laws remain in force by the grace of the new government.

How about customary law? Are they commands of the sovereign? Austin equally had a tough time surmounting this challenge. Elegido, for example, asks who has commanded the rule that the payment of bride price is a necessary requirement for the validity of a customary marriage. Austin's reply is that such custom is still attributable to the commander because customs are indirectly commanded, by being made ground of judicial decisions. He said that:

> Customary laws are positive laws fashioned by judicial legislation upon pre-existing customs. Now, till they become the grounds of judicial

> decisions upon cases, and are clothed with legal sanctions by the sovereign one or number, the customs are merely rules set by options of the governed and sanctioned or enforced morally.

(c) Sanctions

Note that the element of coercion exists in Austin's definition or characterization of law. He achieved this by stating that such commands must be backed by sanction or threats of sanction. Recall that Thomas Hobbes had said that a law without sword is but mere word. The utility of sanction in law cannot be over-emphasized. For example, the criminal law would be a toothless bulldog were it to merely prohibit theft without stipulating the consequences of any violation such as the payment of fine, damages, restitution, or imprisonment.

According to him, sanctions are based on motivation by the fear of 'evil.' He continued:

> If you express or intimate a wish that I shall do or forbear from some act, and if you will visit me with an evil in case I comply not with your wish, the expression or intimation of your wish is a command. A command is distinguished from other significations of desire not by the style in which the desire is signified, but by the power and the purpose of the party commanding to inflict an evil or pain in case the desire be disregarded.

SELF ASSESSMENT EXERCISE 1

1. Evaluate Austin's thesis on command issuing out from the sovereign.
2. Assess Austin's proposition that every law must be backed with sanctions.

3.3 CRITIQUE OF AUSTIN

As a typical positivist, Austin propounded the command theory in order to tell us all that any law is not just law; that a law properly so called must be that derived from not just an indeterminate man or body of men but from a determinate sovereign to whom everyone else owed the duty of obedience. However, this theory is fraught with some problems that we will consider below.

First, is the observation that as there was no precision in identifying his sovereign in classical times so is such sovereign unidentifiable in contemporary systems of government. His theory appears to fit in more with an absolutist or tyrannical system of government under which one supreme man or a group of men subjects the rest of the society to their whims and caprices. Such regimes are sustained by force of arms. In the modern state system where the respect for human rights is one of the foundational bases of governance, Austin's sovereign does not exist anywhere.

Note that under contemporary governmental systems, the sovereign is no longer the head of State; he is now a mere symbol of the sovereignty of the State. Gone are the days when the king could do no wrong. In modern times, everyone has been brought under the suzerainty of the law. In fact, the sovereign's sovereignty has been displaced by the people's sovereignty. Thus S. 14 of the CFRN 1999, for example, provides that sovereignty belongs to the people of Nigeria from whom government derives all its powers and authority.

Austin had said that the sovereign has the quality of illimitability. But under the doctrine of rule of law, there is no room for such absolutist sovereign or government. 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. He is subject to the oversight and investigatory powers of the National Assembly. He can even be impeached from office.

Secondly, law cannot always be a command of the sovereign especially for laws pre-dating his coming to power such as laws enacted by erstwhile sovereigns, common law and equity, customs, etc. Attempts by Austin to attribute the validity of these laws to the incumbent sovereign were, to say the least, an exercise in linguistic irresponsibility. In this connection, Dias noted that:

> It is artificial to pretend that any Member of Parliament believes that the law of the land has emanated from his commands, for the vast majority of laws existed before he was born. To attribute commands to people, who have neither commanded nor believe that they have done so, is a fantasy.

Thirdly, Austin is credited with seeing law as orders backed by the threat of application of sanctions. Austin's viewpoint appears to apply only to criminal law cases where prohibition is followed by sanction. Note that even a fellow traveller in the train of legal positivism, Prof. Hart, criticised Austin's employment of 'command' to carry through his theory. In this regard, Hart distinguished between duty-imposing laws and power-conferring laws. The former apply in the realm of criminal law. In relation to power-conferring laws, Hart observed that these were laws meant to allow private persons exercise their rights in their relationship or transactions with others without sanctions hanging on their necks like the sword of Damocles. Such relationships or transactions include contracts, will, marriage, etc.

Moreover, when Austin said that the inferiors habitually obey the command of the sovereign, he probably meant such habitual obedience to be part and parcel of the character of the command. If this is the case, then the command would be undermined by habitual disobedience. Would such command cease to be law, to be valid, by the mere fact that it is habitually disobeyed? Is there no separation of the validity of the law and its enforcement? Note Kelsen's theory which is to the effect that disobedience of norms in the normative legal order does not affect the validity of the legal order with a proviso, however, that the validity can be undermined only where such disobedience or non-enforcement is widespread and enduring.

In the fourth place, because international law does not reflect the coerciveness of municipal legal system, Austin had denied that international law was law and rather preferred to derogatorily refer to it as international positive morality? It is true that municipal law is coercive because legal relationship therein is vertical. However, that international law does not replicate the coercive paraphernalia of municipal legal order does not justify the denial of its legal status. Since international law essentially regulates relations amongst states that are sovereign and equal, it is unique. Thus, Rosenne notes that it is a law of coordination, not subordination – a law regulating horizontal relationship. In fact, international law – as expressed in customs, treaties, resolutions and decisions of international or national arbitral awards – is law. It may not be as effective, or command habitual obedience, as municipal law but, contrary to Austinian postulation, international law is law.

From the foregoing, we could conclude that no matter the forcefulness of Austin's arguments, his theory raised more questions than answers. Perhaps, it is not surprising that the theory has been described as being marred by 'sterile verbalism,' and 'naïve empiricism.'

SELF ASSESSMENT EXERCISE 2

Enumerate and discuss some of the pitfalls of Austinian postulation.

4.0 CONCLUSION

In the fashion of legal positivists, John Austin propounded the command theory of law wherein he sought to locate the command or law of a particular political organization within the precincts of an identifiable sovereign. He believed that doing so advanced the cause of positivism – the cause of rejecting that which cannot be proved or demonstrated.

However, his analysis of types of law, and the trilogy leaves much to be desired, at least, in contemporary times. Many atimes, we were tempted to believe that his theory was a recipe for effective dictatorship or autocracy.

Finally, it is relieving to note that much of his theory on the relationship between the sovereign and the subjects or citizens has been overtaken by contemporary events where real sovereignty now resides in the people.

5.0 SUMMARY

In this Unit, we continued our discussion of the theory of positivism by considering the command theory of Austin. He defined law as the command of the uncommanded commander. It is this point of view that informed his categorization and discussion of various types of law.

Thereafter, we examined the trilogy of the sovereign, command and sanctions. Herein, we attempted some analyses of the constituents of the trilogy and, where appropriate, tried to situate it in contemporary politico-legal milieu. In the main,

it was found that the trilogy is a hard sell in contemporary governance of States.

We ended the Unit with a glance at some of the criticisms against his theory.

6.0 TUTOR-MARKED ASSIGNMENT

Although Austin's command theory appears to be consistent with a dictatorship, it is a strange theory in modern democracies. Discuss.

7.0 REFERENCES/F URTHER READINGS

1. J.M. Elegido, Jurisprudence (Ibadan: Spectrum Law Publishing, 1994).
2. L.B. Curzon, Jurisprudence (London: Cavendish Publishing Ltd, 2nd Edition, 1995).

Unit 3 LEGAL POSITIVISM: HANS KELSEN (1881-1973)

CONTENTS

1.0 INTRODUCTION

We will continue our study of the theory of legal positivism with the examination of the Pure Theory of Law, which was propounded by Hans Kelsen (an Austro-American Jurist). He was a central figure in drafting the Austrian Constitution (adopted in 1920), became a judge of the Austrian Supreme Constitutional Court and, after emigrating to the US, participated in the drafting of the UN Charter. He escaped Europe at the rise of Hitler to power. He published dozens of books and articles for over four decades. His positions on several issues changed in subtle but important ways.

In Unit 1 of this Module, we had referred to five possible connotations of legal positivism. One of such was the contention attributed to Kelsen. According to him, legal positivism is about the analysis of legal concepts devoid of any reference to historical inquiries into the causes or origins of laws, sociological inquiries into the relation of law and other social phenomena, and moral inquiries as to the goodness, badness or social aims of law. His extremely positivistic

posture informed the name of his theory Pure Theory of Law. In Pure Theory of Law, Kelsen attempted to render legal analysis free from all ethical or political judgments. Adopting such value-free analysis, he insisted on clear demarcation between positive law and moral law. Like any positivist, Kelsen believed that positive law or the law as it is must not be adulterated by allusion to psychology, ethics, or political theory. This means that he rejected metaphysical speculation, the domain of natural law. Divine, sacred rights are unsupported. His interest was to assist in understanding positive law generally, not a particular legal system. The theory is logically self-supporting and independent of extra-legal rules.

As a positivist, Kelsen sought to furnish a formula that would enable him define and describe law without reference to any non-legal factors. He believed that the existence, validity and authority of law had nothing to do with non-legal factors such as politics, morality, religion and ethics.12 He meant to focus exclusively on the science, and not on the politics, of law. He insisted on the independent consideration of the science of law. The Unit comprises such sub-topics as hierarchy of norms, grundnorm and revolution.

2.0 OBJECTIVES

When we are done with this Unit, you will have the ability to:

Evaluate the Pure Theory of Law;
Establish the connection between the validity and efficacy of norms; and
Assess the role of the grundnorm in a legal system, and the circumstances of its change.

3.0 MAIN CONTENT

3.1 ESSENCE OF PURE THEORY OF LAW

Kelsen understood law to be a system of coercion imposing norms concerned primarily with the application of sanctions to persons who have acted in a

12 Austin M. Chinhengo, Essential Jurisprudence 43 (Great Britain: Cavendish Publishing Limited, 1995).

particular manner. Recall that his definition is consistent with that offered by Austin. Austin had defined law as an order backed by sanctions (in the form of deprivation of liberty or property).

According to Bix, there are two basic starting points for understanding Kelsen's approach to legal theory. First, normative claims – arguments for how one ought to act or for how things ought to be – can be grounded only on (justified by) other normative claims. This argument, which is commonly attributed to David Hume, states that one cannot derive a normative conclusion from purely factual premises: "one cannot derive an 'ought' from an 'is.'" This is another way of saying that a factual description of events cannot constitute enough ground for prescribing that such events ought to take place. For example, a survey may reveal that people in a particular community worship in a Catholic Church every Sunday. But this would not justify the conclusion that such people ought to worship at that particular Church on Sunday.

You could recall that the gravamen of the contest between natural law and positive law theorists comes down to the difference between 'ought' and 'is.' The 'ought' proposition has to do with what the law ought to be. On the other hand, positive law focuses exclusively on what the law is right here and now. It is in the tradition of this positivistic approach that Kelsen developed his pure theory of law.

Second, lines of justification must necessarily come to an end at some point. For example, an atheist policeman accosts a vehicle with a tinted glass at a checkpoint and orders the driver to park. "How many of you are in the car?" asks the policeman. "I and three others," answered the driver. Then, the policeman asked the driver to open the doors in order to know their identity. But there was no one inside the car. Then the policeman was curious, alleging that the driver was trying to make a fool of him. The driver denied such charge and defended himself by saying that the three others included God the father, God the Son, and God the Holy Spirit. But the officer asked "Where are they?" The driver could not proceed beyond this because he expected everybody (including the policeman) to know that the persons he demanded to see are spiritual forces. The morale here is that there comes a time when we must presume certain things to exist or when we just have to believe or have faith. Thus, Kelsen's discussion of

Grundnorm is based upon supposition or presumption.

3.2 NORMS

To Austin and Bentham, law is a system of rules. However, Kelsen defines law as a system of norms, as the primary norm which stipulates the sanction. Austin and Bentham's system of rules approximates to Kelsen's system of norms. Remember that there is a similarity between Kelsen's definition of law and Austin's characterization of law as the command of the uncommanded commander backed with sanctions. Recall also Thomas Hobbes' morale that a law without sword is but a mere word. A norm is a regulation setting out how persons ought to behave. It is 'ought' because it describes what ought to be, given certain conditions. It is normative. It is prescriptive. It is binding.

He identifies the provenance of a norm in custom and legislation. According to him:

> Norms either arise through custom, as do the norms of common law, or are enacted by conscious acts of certain organisations aiming to create law, as a legislature acting in its law-making capacity.

Recall that the sources of Nigerian law include, inter alia, customs and common law.

According to Kelsen, the law does not just prescribe certain types of conduct. Additionally it couples such prescription with sanction. To him, the element of sanctions – which is a significant constituent of law – is what makes the law to be effective. In this wise, law becomes a coercive order of human behaviour. In the event of violation of legal stipulation, law can be understood as 'norms addressed to officials' such as judges or administrative tribunals to enforce the law against the delict (which is a condition or a justification for the sanction). Thus, against a public official who has received bribe from a multinational company (MNC), ICPC Act 2000 or the EFCC Act 2004 is an address to the high court judge to enforce the provisions of the statutes by convicting, sentencing, or fining him and/or confiscating or forfeiting assets he derived from such corruption.

3.3 VALIDITY AND HIERARCHY OF NORMS

A norm is either valid or not valid. A norm's validity is derived completely from its having been authorized by another legal norm of a higher rank in the *hierarchy of norms (to be discussed below). For example, if the Vice-Chancellor* of the National Open University of Nigeria (NOUN) makes rules to regulate the dress code of students, the validity of such rules would reside in the NOUN Act *1983 which authorizes the VC to make such rules. If no such power exists, then* the rules – no matter their nobility or utility – would be invalid. Also, such rules, even where initially justified by the NOUN Act, would be generally invalidated with the invalidation or repeal of the parent Act.

On the issue of hierarchy of norms, note that every norm depends – for its authority – on a superior norm. All norms whose validity may be traced back to one and the same basic norm (to be discussed below) form a system of norms, or a hierarchy of norms. They are linked hierarchically from the lowest to the highest norm. Thus, to the extent that all the existing laws including bye-laws, rules and regulations, state laws, statutes and the constitution are so linked, they constitute a hierarchy.

3.4 BASIC NORM OR GRUNDNORM

According to Kelsen, a 'basic' norm, or the grundnorm, is one the validity of which does not derive from a superior norm. It is the commencement of a specific chain of legal norms. The grundnorm is the ultimate source of authority for all other norms below the rung of the ladder of the legal order. For example, in tracing the validity of Police regulations on security of persons and property, we will be referred to the Police Act. Thereafter, the validity of the Police Act would be established by reference to the National Assembly which enacted (or which is deemed to have enacted) such Act pursuant to the CFRN 1999. But is the CFRN 1999 the highest in the hierarchy of norms? Is this 'final postulate' which gives validity to other norms?

In a legal-logical sense, the constitution is not the grundnorm. Rather, it is the idea or spirit behind it. Thus, according to Kelsen, the basic norm is pre-supposed

by legal thinking. It is the presupposed starting point of the procedure for creating positive law. It is neither a norm created by custom nor the act of a legal constitution. In other words, grundnorm is assumed, supposed and taken as given. The implication of this is that in linking up the norms in the hierarchy of norms, there comes a time when the norm at the height cannot be attributed to another higher norm, necessitating a situation where the grundnorm becomes, quite unfortunately for an empirical theory as the pure theory of law, a mental or metaphysical construct.

In what sense, then, is the constitution, e.g., the CFRN 1999, regarded as the grundnorm? It is a grundnorm only in a legal positive sense. This approach is adopted in order to save Kelsen's theory from absurdity or so as to give it some realistic grounding. Therefore, for the purpose of legal analysis, the CFRN 1999 is usually thought to be the grundnorm.

3.5 EFFICACY OF NORMS

It is insufficient for law to be valid or legitimate. Much more than this, it must be efficacious. While validity is determined by the traceability of the norm to the existing basic norm, efficacy relates to the effectiveness or enforceability of the norm. In other words, it asks the question whether the norm is obeyed, whether violations are prosecuted. If the answer is in the positive, then the norm is efficacious. Otherwise, it is not. Thus, the principle of legitimacy is restricted by the principle of effectiveness. Although inefficacy may not affect the validity of a norm in the short term, it may do so ultimately. For instance, when the total legal order or the basic norm loses its efficacy, the system of norms may lose its validity. Put differently, they cease to be valid not only when they are constitutionally annulled but also when the total order ceases to be efficacious. Norms must be generally accepted. There must be sufficiency of adherence to the essence of the basic norm. Validity therefore means authorization by higher law + a minimum of effectiveness. 'The efficacy of the total legal order is a necessary condition for the validity of every single norm of the order.'

SELF ASSESSMENT EXERCISE 1

1. How does Kelsen relate validity with efficacy?

2. What is the utility of the grundnorm in the hierarchy of norms?

3.6 CHANGE IN BASIC NORM OR REVOLUTION

A change in the basic norm is another way of saying that a revolution has occurred. An act becomes a norm because it is authorized. But where such act is unauthorized, that is, in a manner not prescribed by existing law, then a revolution has occurred.

Revolution means different things to different people. Basically, it may be peaceful or forceful. Such revolution may be directed against the social, political, economic or legal life of a society. The sense in which revolution is used here is in a legal sense, that is to say, we are concerned with what in law amounts to a revolution. [Refer to the recent military take-over of government by Guinean soldiers immediately the death of the civilian President was announced].

According to Kelsen:13

> A revolution…occurs whenever the legal order of a community is nullified and replaced by a new order in an illegitimate way, that is, in a way not prescribed by the first legal order itself. It is in this context irrelevant whether or not this replacement is effected through a violent uprising against those individuals who so far have been legitimate organs competent to create and amend the legal order…. From a juristic point of view, the decisive criterion of a revolution is that the order in force is overthrown and replaced by a new order in a way which the former had not itself anticipated.

From the foregoing, it is clear that revolution occurs when:

(a) A new order comes into being in an illegitimate way, that is, in a manner not prescribed by the existing order. Consider coups in Nigeria vis-à-vis *S.1 (2) 1999 CFRN;*

13 Hans Kelsen, General Theory of Law and State 117 (New Brunswick, London: Transaction Publishers, 2006).

(b) An illegal act is not creative of law but, when it is efficacious, and becomes acceptable, it becomes a law-creating fact; and

(c) Failure in overthrowing the existing order is treasonable while success is law-creating.

How then does the grundnorm change? See the:

(a) Pakistani case of State v. Dosso14 (Kelsen's theory of revolution was affirmed); and the

(b) Ugandan case of Uganda v. Commissioner of Prisons, Ex parte Matovu15 (Kelsen's theory was also accepted).

However, see the:

(c) Nigerian case of Lakanmi & Kikelomo Ola v. A.G Western State, Nigeria16

The Supreme Court (SC) held that the Federal Military Government (FMG) was not a revolutionary government. In its swift reaction to the SC's rejection of Kelsenian theory, the FMG enacted the Federal Military *Government (Supremacy & Enforcement of Powers) Decree No. 28 of 1970. The Decree re-stated the position of the government that it was a* revolutionary government;

(d) Ghanaian case of Sallah v. A.G of Ghana17 where Kelsen's theory was equally rejected;

(e) Pakistani case of Jilani v. Government of Punjab18 in which the Pakistani SC disowned Kelsen's theory; and

(f) Southern Rhodesian (now Zimbabwean) case of Madzimbamuto v. *Lardner-Burke.19 The question for determination in this case was whether* the 'declaration of independence' and the proclamation of the 1965 *Constitution superseded the 1961 Constitution. It was held that a usurping* government cannot be a lawful government.

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14 (1958) 2 P.S.C.R. 180.

15 (1966) EALR 514.

16 (1970) S.C. 1.

1 7 (1970) 2 G &G 493.

18 (1972) PLD SC 139.

19 (1969) l A.C. 645.

3.7 CRITICISMS

In his Pure Theory of Law, Kelsen set out to purify all the impurities in positive law so that man-made law would be devoid of any metaphysical value or virtue. How well he has been able to do this would be clear from the criticisms that follow:

First, Kelsen's theory of law is said to be arid, unreal and removed from the complexities of the law in action. It distorts reality to the extent that it disregards the socio-political and economic environment of the law. Law does not exist as an isolate. It is part and parcel of the society. Because law governs human conduct, studying it without human consideration would be futile. Thus, Laski, in his Grammar of Politics (1925), described the theory as 'an exercise in logic and not in life.'

Secondly, recall that Kelsen views justice as an "irrational ideal." Noting that justice represents the value-preferences of individuals and is not subject to cognition, Kelsen concluded that it is incapable of scientific definition or description. To him, pure science of law seeks the real and possible law, not just law. His theory declines to justify or condemn law on the basis of its satisfaction of the demands of justice. In rejecting justice as a measure of the validity of law, Kelsen was in a lean minority. If there is any policy of law on which many legal theorists of various backgrounds tend to agree, it is the need to use law to attain justice. However, Kelsen thought otherwise, insisting that justice can be interpreted no more than 'the conscientious application of appropriate general rules.' In other words, he equated justice with legality.

Again, in inexorably tying the validity of law to the existence of sanctions (in the mould of Austin), Kelsen ignores the distinction that Prof. Hart, a fellow positivist, has made between duty-imposing laws and power-conferring laws. Law is not all about sanctions as found in criminal law. Much more than that, law is an instrument through which individuals may order their lives, business or relationship without sanctions attaching to their failure to do so. Note, therefore that the absence of sanctions does not necessarily render a law ineffective.

In the fourth place, bear in mind that Kelsen's grundnorm is, afterall, void of the

positivistic garb. His Pure Theory was aimed at eliminating any idealistic, moral, social or ethical consideration from the law. But his theory was found wanting when he could not locate the grundnorm in a scientific, demonstrable manner. His legal-logical approach could locate the grundnorm only within the realm of idealism or metaphysics – the forte of natural law. For a positivist Pure Theory to rely on the perspective of natural law to give meaning to grundnorm probably demonstrates Kelsen's failure to fully appreciate the scope of either positive law or natural law. In fact, he did a disservice to the positivistic enterprise by relying on or calling to service the idealistic or metaphysical tool of natural law to justify or explain his grundnorm in a theory that was meant to be empirical. His theory turns out to be a case of the pot calling kettle black. It is abstract and unreal.

All this may well have justified the conclusion that his pure theory of law embodies almost all the inaccuracies of positivism.

SELF ASSESSMENT EXERCISE 2

Revolution is the socio-political, economic and cultural change in the society. Discuss against the background of Kelsen's theory on revolution.

4.0 CONCLUSION

Kelsen is the last of positivists that we considered in this Unit. Being a positivist, Kelsen propounded the Pure Theory of Law in order to convey the message of rejection of the methodology of natural law. Such methodology relies on idealism, metaphysics, ethics, sociology, etc. It was Kelsen's desire to project positive law as a law that can stand independently of the values or virtues of natural law or morality.

His Pure Theory of Law attempted to do just that by looking at several relevant aspects of law. In his exposition of grundnorm, he appears to have assisted us in locating the supreme law of the land. But his positivistic methodology was short-circuited when he said that grundnorm is a presupposition or supposition. In legal discourse, something is presupposed when its existence cannot be proved or physically demonstrated. Presupposition belongs to the realm of natural law, not to positive law.

Therefore, Kelsen's reliance on an approach peculiar to natural law smacks of betrayal of the cause of positivism or an indirect admission that his criticisms of natural law were, probably, extreme.

5.0 SUMMARY

In this Unit, we rounded off our discussion of positivism by looking at Kelsen's Pure Theory of Law. Starting with the essence of the theory, we considered norms, validity and hierarchy of norms, grundnorm, and efficacy of norms. Lastly, we looked at some of the criticisms of his theory.

Kelsen defines law as a system of norms, as the primary norm which stipulates the sanction. The norm is valid if it was enacted in accordance with the stipulation of the legal order. The system of norms forms a hierarchy in the legal order with grundnorm sitting atop. Validity of the norms derives from their capacity to trace their direct or indirect origin to the grundnorm.

Validity is distinguished from efficacy of norm. While the former deals with legitimacy, the latter refers to effectiveness. Inefficacy does not ordinarily affect validity but, where it is enduring, it may affect the validity of individual norms or the whole legal order.

The way Kelsen views revolution is narrower than our general perception of the word. Whereas we tend to consider revolution from all perspectives, Kelsen handled it strictly from the legal point of view. Revolution occurs when a new legal order replaces the new in a manner unanticipated by the pre-existing legal order.

Lastly, we considered some of the criticisms that have assailed Kelsen's theory.

6.0 TUTOR-MARKED ASSIGNMENT

Against the backdrop of the decision in Lakanmi's case and the Federal Military *Government (Supremacy & Enforcement of Powers) Decree No. 28 of 1970,* critically assess the status of Kelsen's theory on revolution in the Nigerian legal

order.

7.0 REFERENCES/FURTHER READINGS

1. Austin M. Chinhengo, Essential Jurisprudence (London: Cavendish Publishing Limited, 1995).
2. Brian Bix, Jurisprudence: Theory & Context (Durham, North Carolina: Carolina Academic Press, 2004).
3. Hans Kelsen, General Theory of Law and State (New Brunswick, London: Transaction Publishers, 2006).

MODULE 3 HISTORICAL SCHOOL OF LAW

Unit 1 Von Savigny’s Historical School of Law
Unit 2 Henry Maine’s Historical School of Law

UNIT 1 VON SAVIGNY'S HISTORICAL SCHOOL OF LAW

CONTENTS

1.0 INTRODUCTION

The historical school of jurisprudence manifests the belief that history is the foundation of the knowledge of contemporary era. Two jurists who researched extensively in this area – Friedrich Carl Von Savigny (1799 – 1861) and Sir Henry Maine (1822 – 1888) – will be the subject of examination in this Module.

History is a record of our past. As man has a past so does law. The importance of the historical school of jurisprudence cannot be over-emphasized. Apart from standing in opposition to the natural law school, the historical school is unique for its emphasis on the relevance of generations past to the present and the future.

Von Savigny, the main proponent of this school was a German jurist whose attachment to the historical school was anchored on the volkgeist, or the spirit of the people. According to him, law grows with the growth and declines with the decline of the people. He traces the connection between custom and legislation and concludes that law is best fulfilled when it reflects the custom of the people.

This Unit considers the theory of Savigny on the history and custom of the people, and how they affect the law that is meant to govern their conduct.

2.0 OBJECTIVES

At the end of this Unit, you shall be able to:

Assess the role of history in legal development;
Evaluate the utility of custom in the law of a State; and
Establish the connection between custom and legislation.

3.0 MAIN CONTENT

3.1 INTRODUCTION ON VON SAVIGNY SCHOOL OF LAW

Von Savigny was a Prussian (now German) statesman and historian. The basis of Savigny's conviction derived from his experience of the French Revolution and the Napoleonic conquests. In the aftermath of the destruction of the French, revolutionary ideology guided by the peoples' reasoning flourished. To Savigny and other like minds, this was unacceptable. This is essentially because embracing such philosophy would make mincemeat of the tradition and mores of the people. In fact, such idea would denigrate the traditional institutions to which the people were accustomed. According to him, the essence of the law would be discoverable through the understanding of the spirit of the people, the volksgeist. Savigny's tract entitled Of the Vocation of Our Age for Legislation and *Jurisprudence (1814) summarized his historical approach to law as follows:*

> We first enquire of history how law has actually developed among nations of the nobler races ... That which binds a people into one whole is the common conviction of the people, the kindred consciousness of an inward necessity, excluding all notion of an accidental and arbitrary origin.

He saw law as reflective of the spirit of the people. To him, the growth of legal principles is not in vacuo, not revolutionary, not accidental but evolutionary. He believed that legislation does not, as law does, bear the peculiar marks of the people. Laws are to be found, not made, and are idiosyncratic and reflective of the volkgeist.

According to Savigny, legal development passes through the early stage of unwritten custom, then codification of those customs and, lastly, purposeful legislation. The evolution of law is equally tied to the people's language and the

totality of its beliefs system. However, as the law becomes more complex, it is easier to lose contact with customs or the volkgeist. The reasons for this are two-fold – division of functions and classes, and the technicalization of the law. On the second reason, Elegido suggests that there is no indigenous comparator for such legal concepts as, for example, CIF contracts or land registration.

On the fate of legislation in a State, Savigny states that legislation is of subsidiary importance in legal development. According to him, 'living law' emerges neither from the commands of the sovereign nor from the arbitrary will of a legislator but from the people. In this regard, Savigny states that legislation would be effective only when its contents reflect the values and virtues of the people's customs. It should be recalled that Savigny said this despite the fact that he was the head of the Prussian Department for the Revision of Statutes. You should contrast Savigny's worldview with Austin's command theory which ties legal development to the uncommanded commander.

Perhaps, because he was a scholar of classical Roman law, he relied on Roman law for guidance in his exposition of the legal path that was befitting his country. To him, Roman law seems to have 'eternal significance' for the intellectual underpinning of the volksgeist. For example, Savigny's History of Roman Law in *the Middle Ages (1831) is suggestive of the existence of concepts bordering on* the 'nature of things,' or natural law.

Unlike the claim made by natural law theorists, Savigny canvassed the view of legal relativism. In other words, there is no universal law as every law is culture-specific and limited by time, space and geography. The implication of this position is that law is not as durable as the natural law school suggests and, more important, its contents are a function not of metaphysical demands but of the exigencies of the society in question.

With this background in mind, the following could be said of the historical approach to law as canvassed by Savigny:

(a) The concept of received law is anathema;
(b) Law is inferior to the custom of the people. Therefore, custom of the people must be their laws;

(c) Law personifies the people, and signifies a paradigm of their values;
(d) There is no universal law. The universality of law is limited by geography and culture;
(e) Law is not static. It is amenable to development;
(f) There is no law giver. Law comes from the people.

According to him, the growth of law is a function of the interface or interaction between one generation and another generation. The strength or weakness of the law is traceable to the people. Law and language flourish when the people flourish and die when the people lose their individuality. Therefore, he said that:

> Law grows with the growth and strengthens with the strength of the people and finally dies away as the nation loses its nationality or as a people loses its individuality.

The morale here is that law exists to serve humankind, not the other way round. Consequently, there should be no room for unjust laws or laws that are inconsistent with the aspiration of the people.

3.2 CRITICISMS OF VON SAVIGNY

Savigny was an apostle of home-grown law, law fashioned after the character and nature of the people. There is much utility derivable from such a law. First, the people would be used to the laws by which they are governed. Second, flowing from the first point, the State may not need to spend much on law enforcement since the people or most of them would, anyway, abide by societal laws.

But how contemporarily realistic is Savigny's historical perspective to law? His theory is subject to criticisms for many reasons.

First, the volkgeist is perceived by many as fictional, incapable of proof, and of little value in jurisprudential analysis. Although Savigny's nationalistic veil might have endeared him to like minds, his definition or description of the *volkgeist – the nucleus of his proposition – as resembling 'a spiritual communion* of people living together, using a common language and creating a communal conscience' was neither here nor there. In heterogeneous societies, it would be an

uphill task to locate that 'communal conscience.' Perhaps, his theory was meant to apply to highly homogenous societies but he did not make this clear.

Second, Savigny overestimated or overrated the potency of custom. It is true that custom, being a mirror of accepted usage, has a role to play in cementing sections of the country together. But the utility of custom is limited in the face of societal complexities, the challenge of development, etc. What happens, for example, if a country hitherto free of earthquakes has become prone to such natural disaster? Of course, there would be no existing cultural code governing the area; it would be recondite. Therefore, it would be rational and pragmatic for the country affected to import laws from jurisdictions that have had the experience of earthquakes.

Within the context of African experience, we may ask the extent to which customs determine the laws of Anglophone, Francophone and Lusophone Africa. Evidently, these parts of Africa were colonized by the English, French and the Portuguese respectively. The colonists came with their laws many of which displaced pre-existing customs. Although indigenous people initially rejected such displacement, they have come to accept or retain many of such laws in their legal systems at independence and beyond. In Nigeria, for example, the received English Law (common law, equity and statutes of general application) has become part and parcel of Nigerian law.

Third, Savigny has been cited for inherent inconsistency. He advocated the nationalism of laws. As a German, this meant that German legal system must be based on German customs. Ironically, however, he recommended a refined system of Roman law for German people. This was absolutely against the intent and purposes of the volkgeist because by no stretch of the imagination were Rome and Germany one and the same thing. As Curzon concludes, the suggestion that legislation predicated upon the spirit of the principles of Roman law would have coincided with the demands of the German 'folk spirit' is not easy to sustain.

In contemporary times, the irrelevance of Savigny's advocacy is glaring. This is because in our global village, there is mutual inter-dependence so that, according to need, countries freely import foreign laws into their legal systems. For

example, Ethiopia's Haile Selassie employed the French Professor, Rene Dafr, to write the country's Criminal Code, which was fashioned after the French law.

Note that the provisions in many international Conventions signed and domesticated by most countries were originally the customs or the foreign laws of very few countries. Although their domestication does not undermine the importance of customs, it demonstrates the gross limitation of Savigny's thesis on custom as the substructural or basic source of law.

4.0 CONCLUSION

This Unit focused on Savigny's perspective to legal development. We examined his emphasis on history as the basis of development of a people. History has several strands including legal history. Law develops simultaneously with the development of the people. Law is not created; it evolves. That law is authentic which reflects the volkgeist or the spirit of the people. Such approach convinces the people that the law is theirs and they would most likely be compliant with the law. Consequently, it would cost the State little or nothing to enforce such law.

However, Savigny is criticised for privileging custom over legislation because history shows that most States have relied heavily on legislations. Moreover, most legislations have derived from foreign jurisdictions. Again, Savigny is accused of hypocrisy to the extent that he twisted his theory to accommodate the application of (foreign) Roman law in German territory.

5.0 SUMMARY

The historical approach to law holds that legal development is a function of the people. In other words, the law is tied to the mores, culture or tradition of the people. Savigny perceived law as reflective of the spirit of the people, the *volkgeist. To him, legal development is evolutionary, not revolutionary. Laws are* to be found, not made or given. According to Savigny, legal development passes through the early stage of unwritten custom, then codification of those customs and, lastly, purposeful legislation.

He denies the universality of law. [Recall that Cicero defined natural law as

unchanging, universal and everlasting]. In denying law these qualities, Savigny emphasized the temporality of law and, the importance of time, space and geography in legal development. In other words, Savigny argued for the relativism of law.

However, Savigny is criticised on several grounds.

6.0 TUTOR-MARKED ASSIGNMENT

The people-oriented approach of Savigny does not immune his theory from harsh criticisms. Discuss.

7.0 REFERENCES/F URTHER READINGS

1. J.M. Elegido, Jurisprudence (Ibadan: Spectrum Law Publishing, 1994).
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UNIT 2 HENRY MAINE'S HISTORICAL SCHOOL OF LAW

CONTENTS

1.0 INTRODUCTION

In continuation of our examination of the historical school of jurisprudence, we will focus on the works of Henry Maine in this Unit. We will look at the three stages of legal development, static and progressive societies, and the change from status to contract.

Lastly, we will consider some of the criticisms of the approach adopted by Henry Maine.

2.0 OBJECTIVES

At the end of this Unit, you will have the capacity to:

Assess the legal developmental stages of societies; and

Evaluate the relationship between status and contract.

3.0 MAIN CONTENT

3.1 STAGES IN LEGAL DEVELOPMENT

Maine's deep knowledge of early society resulted in his emphasis on man's deep instincts, emotions and habits in historical development. According to him, law

can be understood as a late stage in a slow-evolving pattern of growth. He believes there are three stages in legal development in early societies – law as the personal commands and judgements of patriarchal rulers; law as custom upheld by judgements; and law as code.

In the first stage, absolute rulers dominated. It was the age of the divine rights of kings, where the king could do no wrong. System of rulership was absolutist and draconian. There were no principles governing governance; only the whim and caprice of the king reigned. Recall Austin's commander, who was above the law, and whose commands must be obeyed by inferiors.

The second stage is heralded by the decline of the power and might of patriarchal rulers. In their place, the oligarchies of political and military rulers emerged. The oligarchies claimed monopoly of control over the institutions of law. Notice that Nigeria could be said to have experienced this under military regimes where rulers of the period manipulated the legal system through decrees and edicts. Maine maintains that the judgements of the oligarchies evolved or solidified into the basis of customs. But the customs are largely unwritten, giving interpreters the opportunity to enjoy a monopoly of explanation.

In the third stage, which represents the breaking of the monopoly of explanation, codification characterizes the legal system. Examples include the Roman Twelve Tables and Solon's Attic Code.

SELF-ASSESSMENT EXERCISE 1

Enumerate and discuss the three developmental stages that a society is destined to experience.

3.2 STATIC AND PROGRESSIVE SOCIETIES

Maine further propounded that for the purpose of the development of law, society can be categorized into two: static society and progressive society.

Static or stationary societies did not move beyond the concept of code-based law. In this society, reference to the code answered all legal questions. According to

Maine, members of the society were lulled into the belief in the certitude of code and were, therefore, unwilling to reform the law.

On the other hand, progressive societies were to be found in Western Europe. These societies were dynamic and amenable to legal reform. They brought about the development and expansion of legal institutions.

In the development of law in progressive societies, Maine identified the characteristic use of three agencies – legal fictions, equity and legislation. Legal fictions are mere suppositions aimed at achieving justice by overcoming the rigidities of the formal law. Cast your mind back to the clash between common law and equity which was finally resolved in favour of equity through the *Judicature Act 1875.*

According to Maine, legal fictions help to ameliorate the harshness of the law. A classical example he gave was the institution of the Roman fiction of adoption. He called equity a secondary system of law. It claimed a superior sanctity inherent in its principles which exist side by side with the law. In many cases, it could displace the law. Recall again the conflict between common law and equity that we referred to in the preceding paragraph.

Legislation represents the final development of the law. It is an institution through which various laws in the society are reduced into writing or codes.

3.3 MISCELLANY

The raw material Maine used for his legal analysis was Roman law. In Roman law, Pater Familia was the only person invested with capacity to contract. He alone could act for and on behalf of his wife, children and slaves. Subsequently, there was development from pater familia to familia and to persona, the highest form of development of the person.

Maine is also known to have commented on ‘status’ and ‘contract.’ He said that “the movement of progressive societies has hitherto been a movement from status to contract.” In explaining this statement, Maine said that in early times an individual’s position in his social group remained fixed; it was imposed,

conferred or acquired. He just stepped into it. He accepted such fate as he found it. He could do nothing about it. Later on, however, there came a time when it was possible for an individual to determine his own destiny through the instrumentality of contract. No longer was anything imposed on him from external forces; he was now in charge: from slavery and serfdom, from status determined at birth, from master-servant relationship to employer-employee contract. The morale is that society moves from status to contract. In ancient law, (status inheritance) was of the essence but in modern society it is consideration (contract).

SELF-ASSESSMENT EXERCISE 2

Maine's categorization of societies into static and progressive societies is more apparent than real. Discuss.

3.4 CRITICISMS OF MAINE

Maine is criticized for oversimplifying the nature and structure of early society for the following reasons:

Early society does not show an invariable pattern of movement from the three-stage development of law – from personal commands and judgements of patriarchal rulers through law as custom upheld by judgements to law as code.

The so-called rigidity of the law has repeatedly been challenged by contemporary anthropologists who are of the opinion that primitive peoples were adaptable and their laws flexible.

Also, there were matriarchal societies just as there were patriarchal societies.

Furthermore, it has been observed that status does not necessarily gravitate to contract. Rather, the opposite development has been possible. For example, social welfare legislation in advanced countries is status-based. In the US, 'affirmative action,' a policy that is predicated on Afro-Americanism, is status-based. Also, in Canada, the status of a single mother is recognized in law.

4.0 CONCLUSION

In this Unit, Maine brought his knowledge of earlier societies to bear on legal development. His approach re-affirms the utility of history in understanding today and tomorrow.

However, in his study of static and progressive societies, he tended to take too much for granted. This is evident in the fact that there are very few societies that can be strictly categorized as static or progressive. What you are most likely going to find is a bit of this, a bit of that, or a hybrid.

Finally, we conclude by saying that although Maine lived up to his historical commitment, he overlooked the dynamics that have characterized societies across ages.

5.0 SUMMARY

This Unit considered Maine's contribution to the historical approach to law. It looked at the three stages of legal development, and static and progressive societies. Moreover, we examined his contribution in the area of the social mobility from status to contract. Finally, we considered some criticisms directed against his methodology.

6.0 TUTOR-MARKED ASSIGNMENT

There has been more of a change from contract to status in contemporary times. Discuss.

7.0 REFERENCES/FURTHER READINGS

L. B. Curzon, Jurisprudence (London: Cavendish Publishing Limited, 1998).

MODULE 4 SOCIOLOGICAL SCHOOL OF LAW

UNIT 1 Scope of Sociological School (1)

CONTENTS

1.0 INTRODUCTION

This Unit 1 in this Module introduces the discourse on sociological approach to jurisprudence, looking at the contributions of Jhering (1818-1892), a German jurist; Erlich (1862-1922), an Austrian jurist; and Durkheim (1858-1917), founder of the French school of sociology. Unit 2 will look at the works of Max Weber (1864-1920) and Roscoe Pound (1870-1964).

The Sociological School of jurisprudence considers law or legal development from the perspective of the people in the society. Perceiving law as a social phenomenon, it posits the harmonization of law with the wishes and aspirations of the people. In other words, it insists on the harmony between law and the interests of the people. Therefore, if law becomes inconsistent with the people or even violates their interests or expectation, such law is not worth it. Such law is not people-oriented.

We may draw a comparator between the sociological theory and the historical approach because they are both people-centred. We note, however, that while the sociological approach considers the here and now of the people, the historical

approach looks at the past or the history of the people.

The sociological approach offers a window of opportunity for legislators and reformers to take into account contemporary interests of the people in the performance of their duties.

2.0 OBJECTIVES

At the end of this Unit, you will be able to:

- Analyse the law in early societies and in contemporary ones; and
- Assess the role of 'living law' in modern legal development.

3.0 MAIN CONTENT

3.1 SOCIOLOGICAL APPROACH

The term 'sociology,' which was invented by Comte (1798-1857), is the study of the behavioural pattern of people in relation to their environment or surroundings. Within the purview of sociology, law is regarded as a social phenomenon which reflects human needs and aspiration. Thus, Faris (p.149) defines sociology as:

> [A] branch of the science of human behaviour that seeks to discover the causes and effects that arise in social relations among persons and in the intercommunication and interaction among persons and groups.20

The Sociological School of Law is a collection of academics and practitioners committed to the study of law as a social phenomenon. In other words, sociological approach to jurisprudence is the study of law in its social setting or as a social institution. In his Mechanical Jurisprudence (1908), Roscoe Pound explains that sociological movement in jurisprudence is:

> [A] movement for pragmatism as a philosophy of law; for the adjustment

20 L.B. Curzon, Jurisprudence 37 (London: Cavendish Publishing Ltd, 2nd Edition, 1995).

> of principles and doctrines to the human conditions they are to govern rather than to assumed first principles; for putting the human factor in the central place and relegating logic to its true position as an instrument.

In order to do justice to this topic, we shall be looking at the theories of Jhering; Erlich; and Durkheim.

3.2 JHERING

To Jhering, law existed to protect societal interests and individual interests. But, as would be expected, the two interests are often at cross-purposes. When such occasion arises, law coordinates and mediates in the social conflict between them. Law impartially mediates and resolves the competing interests. Despite such conflict, he stressed the mutuality of both interests because, afterall, the object of the society is to secure and guarantee the satisfaction of human wants.

Note that law is purpose-driven. In other words, law exists in a social setting to achieve some social purposes. For example, the preamble to the Constitution of the Federal Republic of Nigeria (CFRN) 1999 declares in part that the Constitution exists "for the purpose of promoting the good government and welfare of all persons in our country on the principles of Freedom, Equality and Justice, and for the purpose of consolidating the Unity of our people."

According to him, interests determine, dictate or influence purpose. For a proper understanding of the law, interests behind it must be thoroughly studied. The law aims at the equalization of conflicting social interests. In effect, the law is 'the realized partnership of the individual and society.'

Jhering believed in the relativism of law. According to him, societal purpose and standards will change in time and space. Therefore, the idea of the existence of "immutable natural law" as an absolute guide to social and legal activity is unrealistic. In other words, Jhering rejects a universal law that will minister to the needs of all at all times.

He was of the view that law aims at creating unity from diversity. In his view, law aims at the good of the society and permits individuals to realize their

purposes. Law is the mediator, the balancer and the harmonizer. Legal institutions enable man to add to the quality of his being.

SELF-ASSESSMENT EXERCISE 1

How does the CFRN 1999 reflect the sociological theory of Jhering?

3.3 ERLICH

In his Fundamental Principles of the Sociology of Law (1912), Erlich declared that the centre of gravity of legal development lies not in legislation, nor in juristic science, nor in judicial decision, but in society itself. To him, there were two sources of law: legal history and development, and "the living law." Living law grows within society. It may be so widespread to such an extent that it becomes the basis of the conduct and interaction of members of the society even though it has not been formally proclaimed to be the law.

He differentiated between norms for decision and norms of conduct. Norms for decision are laws, rules and regulations in the form of the Laws of the Federation of Nigeria (LFN), Statutes, Acts of the National Assembly and judicial decisions thereon. On the other hand, norms of conduct are self-generating social rules dependent upon no superior sanctioning authority. These are moral codes applicable to persons as individuals or as members of social clubs.

He recognized the existence of a gap between living law and positive law. Against this background, therefore, it is the duty of legislators and judges to recognize the reality of this gap in order to come up with legislations and decisions that will give vent to the yearnings and aspirations of members of the society or polity.

But what if the living law is damaging to the interest of the people as a whole or to the greatest happiness of the greatest number? For example, is Erlich understood as suggesting that since corruption appears to be part and parcel of the Nigerian life that the National Assembly should find a way of recognizing the gap between the current anti-corruption regime and the 'living law' of rampancy of corruption and, therefore, find a way of legislating corruption into existence?

To the extent that Erlich did not qualify the applicability of his theory on 'living law' we could take it that his theory would accommodate such legislation of corruption into existence.

However, because we know the deleterious effects of corruption, such proposition would be unacceptable. Herein lies the inadequacy of Erlich's theory. As attractive as his theory may have been or sounded, his failure to make allowance for exceptions, that is, situations where the living law can or must be suppressed or undermined weakens the strength of his theory.

Note that living law can function best if it harmonizes with the moral consciousness of the society. There was a time in history when slave trade and racism were living laws. In fact, they were actually legislated into positive law. But the fact still remained that the practices were evil. When the anti-slave trade and civil rights movements emerged to dislodge the living laws, they were ferociously resisted by those who benefited from the living laws. It took the persistence and political will of several States to enforce the law against the practices. In contemporary times, those living laws have been replaced by liberty of all and the freedom of blacks.

SELF-ASSESSMENT EXERCISE 2

Living law should form the basis of legislation in Nigeria. Discuss.

3.4 DURKHEIM

Durkheim perceived law as an 'index to the level of development' within a community. In his investigation of the development of early societies, he found various levels of social cohesion or solidarity. He categorized such solidarity into two: mechanical solidarity and organic solidarity.

A mechanical solidarity society is marked by underdevelopment, uniformity of values, low level individualism and mutual assistance. Law tends to be strict and repressive while sanctions are severe. This is because there is usually the belief in offender-oriented penal system. The system is to the effect that the offender must be severely punished for the purposes of retribution and deterrence. In other

words, this society exhibits communal tendency where one may be another's keeper.

On the other hand, a society with traits of organic solidarity is more advanced. Herein, there are specialization, division of labour, and individualism. In organic solidarity, the penal policy is victim-oriented. Thus, restitution tends to replace mere vengeance. Here, the objective is not to punish but to restore the state of things to status quo ante bellum.

Durkheim was a moralist and believed that law derived from the morality of the society. Law and morality produce an amalgam of ties which bind individuals to society. He demonstrated his moral credentials by privileging laws emanating from the morality of the people over any other law, for example, in the area of crime and punishment. According to him, an act is criminal when it offends the collective societal conscience. To him, members of the society are not shocked or angered by conduct merely because it is a crime by legislation (mala prohibita) but because it shocks societal collective conscience (mala in se). He located the purpose of punishment not in the theory of deterrence but in the need to satisfy the common consciousness, that is, societal sentiments. He believed that the punishment of an offender is 'reparation' offered to the feelings of members of the community.

However, Durkheim's approach to law could not impress many jurists because he failed to back up his claims with necessary data sourced from field work. Additionally, his 'social solidarity' is criticized on the ground that there is no necessary correlation between solidarity and the level of civilization. Also, his mechanical solidarity is doubted because recent research has shown that primitive societies were not necessarily repressive. Rather, there is evidence of non-repressive primordial systems.

Also, he is criticized for tying earlier societies to the principles of retribution and vengeance. This is because experience and research have shown that many primitive societies embraced justice system that is based on restoration of the victim to status quo ante bellum. In fact, there are many modern legal systems which prioritize the penological theories of retribution and vengeance over reparation, which makes lex talionis the focal point of the criminal justice

system.

4.0 CONCLUSION

The Sociological School of jurisprudence attempts to look at law against the background of the people it is meant to govern. It believes that law cannot exist in the absence of the people, that law must be part and parcel of the people in order to command legitimacy.

However, though 'living law' as propounded by Erlich harmonizes with the aspirations of the people, it gives cause for some concern. This is especially so where such living law does not immediately or ultimately promote the well-being of the people or society. An instance is corruption which persists across every nook and cranny of Nigeria. Do we then legalize corruption? For enlightened self-interest, many societies have been able to recognize the limitation of the living law theory and rejected the temptation to legislate such law into existence. Thus, even in Nigeria, corruption is rather suppressed than promoted.

We may end this discussion by stating that the contributions of the sociological arm of jurisprudence to legal thought cannot be overemphasized. They assist us in aligning our legislation with the wishes and aspirations of the people whose conduct it is meant to regulate. However, it is important to realize the limitation of the theory.

5.0 SUMMARY

This Unit commenced with the background look at the meaning of sociology – which was coined by Comte – and the sociological school of jurisprudence. The School is a collection of academics and practitioners committed to the study of law as a social phenomenon. Proponents we considered included Jhering, Erlich and Durkheim. Jhering examined the conflict between societal interests and individual interests, and the mediating role of law. He also stressed that against the background of the fact that societal purpose and standards change in time and space, it was unrealistic to insist on the existence of "immutable natural law."

The contribution of Erlich centred on the distinction he made between legal history and development, and living law, and between norms for decision and

norms of conduct. Living law grows within society, and it may be so widespread as to be the basis of conduct of the people.

In investigating the development of early societies, he categorized such societies into mechanical solidarity and organic solidarity. While law tends to be strict and repressive in the former, it is usually humane and restorative in the latter. However, Durkheim's theory is believed to have been unscientific. His theory has also been faulted for its failure to properly appreciate the nature and character of earlier societies.

6.0 TUTOR-MARKED ASSIGNMENT

Critically examine the relevance of Durkheim's theory to the Nigerian legal order.

7.0 REFERENCES/F URTHER READINGS

L.B. Curzon, Jurisprudence 37 (London: Cavendish Publishing Ltd, 2nd Edition, 1995).

UNIT 2 SCOPE OF SOCIOLOGICAL SCHOOL (2)

CONTENTS

1.0 INTRODUCTION

Building on Unit 1, Unit 2 examines the theories of Max Weber (1864-1920) and Roscoe Pound (1870-1964). Weber was a German jurist, economist and sociologist whereas Pound was the Dean of Harvard Law School. While Weber sees law as social institution, Pound perceives it as an instrument for balancing the security of society and individuals.

Regarding Weber, we will look at his categorization and analysis of the types of authority – traditional authority, charismatic authority and rational-legal authority.

In connection with Pound, we will consider his views on interests, types of interests, and the way and manner in which law can resolve the conflicts amongst the variety of interests in the society.

2.0 OBJECTIVES

When we are done with this Unit, you will be able to:

Establish the relationship amongst traditional authority, charismatic authority and rational-legal authority in contemporary modes of governance; and

Evaluate the possibility of law to resolve the conflicts of so many interests within the society.

3.0 MAIN CONTENT

3.1 MAX WEBER

Max Weber was concerned with social order. In his Law in Economy and Society (1891), he located the essence of social order in norms and the capacity to enforce them. To him, it is power that makes the law effective. And power is the ability of persons or institutions to affect the will and behaviour of others by coercion or the threat of such coercion. Animating or propelling the exercise of such power is the acceptance by society of legitimate authority. Such authority is said to exist where those persons accept their rulers as a living embodiment of the idea of "power through authority."

3.1.1 Types of Legitimate Authority

In the aftermath of his investigation into the legal history of societies, Weber found that there are three types of legitimate authority as follows:

(a) Traditional Authority

This type of authority existed in consequence of the community's long habituation to the concept of legitimacy based on tradition. Obedience of constituted authority was predicated not on enacted laws but upon the belief that the rulers had an authority conferred by tradition. Recall the *divine rights of kings and the concept of the king can do no wrong. These* were geared towards giving transcendental coverage to the conduct of rulers in distant ancient past and insulating their rulership from legal restriction. In other words, rulers of the age in question were elevated over and above ordinary citizens; they were treated as gods or demi-gods.

i. Charismatic Authority

This is the authority derived from the charisma (gift of grace) of an extra-ordinary person – hero, prophet – who seems to be invested or endowed with superhuman powers. Revolutionary leaders wield such authority in the first years following their victorious revolutions. Notice that from the early 1960s till around 1990s, military take-over of the reins of political power was rife in Africa. Coup plots were celebrated by the people in the belief that some persons in messianic mission have arrived. Many leaders who emerged from the overthrow of the old order had charismatic authority. The people attributed to them the extra-human capacity to make things happen for the benefit of the people. But at the end of 1990, and nothing really to attest to the genuineness of the persons in the saddle, things fell apart. As the so-called messiahs could not deliver goods and services, as they privileged their personal comfort over that of the generality, the people lost faith in them and, ipso facto, the charisma vanished. Therefore, the ensuing contradiction or gap between expectation and fulfilment undermined and destroyed the basis of the ruler's charismatic authority.

ii. Rational-legal Authority

This kind of authority is impersonal. It is characterized by belief in the legality of legislation. Obedience is gained neither by traditional nor charismatic authority but by virtue of the belief in the legitimacy or validity of parliamentary/constitutional supremacy, which regulates the way and manner power is exercised amongst the arms of government, and the rights and duties of citizens. For example, the CFRN 1999 is a manifestation of rational-legal authority. Authority attaches not to the occupant of the office but to the office itself. For example, S. 308 on the immunity of the President, Vice President, the Governor and Deputy Governor exists not to benefit the persons occupying these offices but to dignify the office. That is why the section applies only to the extent that the person in question is an incumbent.

Weber noted that this type of authority guarantees certainty, predictability and stability within which a law of contract develops. He, therefore, concluded that it

is a fertile ground for the development of a capital society.

SELF-ASSESSMENT EXERCISE 1

Critically examine the statement that the three types of authority are identifiable in contemporary systems of government.

3.2 ROSCOE POUND

Roscoe Pound – who was a dean in Harvard Law School – is known to have been the most influential proponent of the American Sociological jurisprudence. He essentially saw law as a social institution created and designed to satisfy human (individual and social) wants.

He agonized over the fact that traditional scholarship focused almost exclusively on the law in the textbooks to the detriment of the law in action. Law in action refers to the law that actually reflects the current behaviour of the people. In other words, he was of the view that the society should be the focal point of law and legal development, that the social mass must be able to influence the law that regulates their behaviour. This approach has the potential to, in the long run, eliminate unjust laws. Essential features of the legal order were the securing and protection of various (often competing) interests in the society. He dwelt much on interests. In his Outlines of Lectures on Jurisprudence (1943), he defined interest as:

> a demand or expectation which human beings either individually or in groups, or associations or relations, seek to satisfy, of which, therefore, the adjustment of human relations and ordering of human behaviour through the force of a politically organized society must take account.

Note that legal protection of interest is usually expressed by conferring the status of a legal right on it. He identified and classified interests into three groups – individual interests, public interests, and social interests.

Individual interests are ‘demands or desires involved in or regarded from the standpoint of the individual life.’ They include personality (consisting of interests

relating to an individual's physical and spiritual existence, for example, physical security, health, freedom of will, privacy and sensibilities, beliefs and opinions); *domestic relations (including interests of parents and children and the protection* of marriage); and substance (comprising interests of property, succession and testamentary disposition, freedom of industry, contract and association, that is, those claims or demands 'asserted by individuals in title of the individual economic existence.'

Public interests are 'demands or desires involved in or looked at from the viewpoint of life in a politically organised society, asserted in title of political life.' They include the interests of the State considered as a juristic person, that is, its integrity, freedom of action and security; and interests of the State considered as the guardian of social interests.

Lastly, social interests are those 'wider demands or desires involved in or looked at from the standpoint of social life in civilised society and asserted in title of social life.' Such social interests enumerated by Pound are many and they comprise:

(a) General security, including claims to peace and order (against those actions likely to threaten the very existence of society), safety, health, security of transactions and acquisitions;
(b) Security of social institutions (domestic, religious, political and economic);
(c) General morals, that is, security of social life against acts offensive to general moral sentiments;
(d) Conservation of social resources, e.g., use and conservation of natural resources, protection and education of dependants and defectives, protection of the economically-dependent.
(e) General progress, which is the assertion of the social group toward higher and more complete development of human powers, including economic progress (freedom of property, trade, industry), political progress (freedom of criticism), cultural progress (freedom of science, improvement of education and aesthetic surrounding); and
(f) Individual life, involving the claim or demand of each individual to live a full life according to society's standards.

With this array of interests in a society, it is only a matter of course that contention, conflicts and controversies will arise. How then does Pound expect these interests to harmoniously exist in the society? His response is that law is really about reconciling, harmonising, or compromising these conflicting interests either through securing them directly and immediately or through securing certain individual interests so as to give effect to the greatest number of interests, or to the interests that weigh most in our civilisation with the least sacrifice of other interests. All he appeared to be saying is if all the interests cannot be enforced then most of the interests should be enforced. Alternatively, certain interests must be prioritized over others and enforced with minimal collateral damage to other non-priority interests. Pound was of the opinion that the concern of the law is to satisfy as many interests as possible and to resolve any conflicts amongst the categories of interests he had identified.

He used 'social engineering' as a metaphor. According to him, law is an instrument of social engineering, for balancing competing individual, public and social interests within the society. In doing so, Pound argued that the tools of rules, principles, conceptions and standards must be employed.

As society progresses, Pound noted that 'new interests' will emerge or evolve. Notice that international human rights law has witnessed the evolution of new generational human rights in addition to the traditional first and second generational rights. Recognition of such new interests would be realised subsequent to their being tested by reference to 'jural postulates' of a civilised society. Those postulates embody societal values. Such reference would enable legislators to consider possible modification of values through legislative reforms. According to Pound, pursuant to the postulates, the citizens in a civilised society are entitled to assume:

(a) That others will commit no intentional aggression upon them;

(b) That they may control for beneficial purposes what they have discovered, created or acquired;

(c) That promises will be carried out in good faith and that unreasonable and unjust enrichment will be prevented as far as possible;

(d) That persons engaged in a course of conduct will act with due care so as not to create unreasonable risk of injury to others;

(e) That citizens shall be entitled to assume that the burdens incident to social life shall be borne by society; and

(f) That, as a minimum matter, 'a standard human life' shall be assured to every citizen.

Pound's approach was for a functional approach to law. Also, his approach harmonizes with that of the utilitarian school which propounds the greatest happiness of the greatest number of people. All he was mostly concerned about was the need for the legal order to influence societal needs so that the law would not appear foreign or alien to the people. He was, therefore, desirous of bridging the gap between the law in textbooks and the law in action.

However, against the backdrop of the foregoing, he failed to tell us if the interests he identified are exhaustive. Moreover, he has not been able to convince us about how conflicts generated by the variety of interests can be resolved. Although he indicated that this can be done by weighing and balancing, he failed to elaborate. When you have to weigh, then certain interests must give way. What parameter do you use to weigh or measure? Although he expected the minimum of interests to be trampled upon, it is still the case that certain interests would be sacrificed. If he adopted the utilitarian theory, then it means minority rights would have a raw deal.

Again, note that 'civilization' featured in his analysis of conflict resolution. But this should not imply that those considered to be uncivilised cannot resolve conflicts. Note that if mediation is a yardstick for measuring the level of civilisation, then those said to be uncivilised have been erroneously labelled. This is because in these 'uncivilised' societies, conflicts are mediated and controlled by institutional mechanisms.

SELF-ASSESSMENT EXERCISE 2

The interests identified and discussed by Pound are too many and unwieldy. Do

you agree?

4.0 CONCLUSION

This Unit dwelt on the theories of Weber and Pound. Weber introduced us to different types of authority including traditional authority, charismatic authority and rational-legal authority. We note that in modern systems of government, rational authority is most popular. That is not to say, however, that traces of traditional and charismatic authority are missing. They may even be observed or noticed in systems renowned for rational-legal authority. But note that their influence is declining in modern governance of people.

Pound focused on various interests in the society, that is, individual interests, public interests, and social interests. To him, the law played a mediatory role in resolving the conflicts which are bound to emanate from such array of interests. However, resolving such conflicts is easier said than done, and minority rights are usually sacrificed in the process.

Finally, we may conclude by stating that the contribution of the duo can be taken as a recipe for resolving conflicts within the society. This is more so in modern democracies where dissent or alternative views are encouraged. The task, therefore, is for persons entrusted with rulership to be able to take benefit of their theories for resolving or harmonizing conflicting interests.

5.0 SUMMARY

This Unit was the concluding part of our consideration of the sociological approach to law. It looked at the theories of Weber and Pound. Weber located the essence of social order in norms and the capacity to enforce them. Power makes law effective. Propelling the exercise of such power is the acceptance by society of legitimate authority, which he categorized into three – traditional authority, charismatic authority and rational-legal authority.

While traditional authority rests on appeal to tradition, charismatic authority is predicated on the charisma or personal quality of the ruler, an extraordinary person or hero. Rational-legal authority is impersonal, characterized by belief in

the legality of legislation. Here, obedience is secured neither by traditional nor by charismatic authority but pursuant to rule of law. This type of authority guarantees a certain, predictable and stable development of capitalist society.

On his part, Roscoe Pound, the most influential proponent of the American Sociological jurisprudence, saw law as a social institution created and designed to satisfy individual and societal wants.

He delved deeply into the study of interests, which he defined as a demand a demand or expectation which human beings seek to satisfy. He identified three types of interests, individual interests, public interests, and social interests. In handling the controversies or conflicts that will arise out of this assemblage of interests, Pound said that it was the duty of the law to reconcile, harmonize and compromise these conflicting interests. In this sense, law is an instrument of social engineering, for balancing competing individual, public and social interests within the society.

He also said that as society progresses, 'new interests' will emerge. It is against this background we recall the evolution of new generations of human rights subsequent to the first and second generational rights.

6.0 TUTOR-MARKED ASSIGNMENT

How do you react to the assertion that law is incapable of resolving conflicting interests in the society?

7.0 REFERENCES/F URTHER READINGS

L.B. Curzon, Jurisprudence 37 (London: Cavendish Publishing Ltd, 2nd Edition, 1995).

MODULE 5 UTILITARIAN SCHOOL OF LAW

UNIT 1 UTILITARIANISM (1)

CONTENTS

1.0 INTRODUCTION

Utilitarianism is a positivistic reaction against what has been perceived as the excesses of the natural law school approach to law. In its disgust with the unscientific methodology and metaphysical orientation of natural law, the utilitarian theory seeks ways of meeting the welfare needs of the people without allusion or reference to the higher authority of natural law or even God. The major proponents are Jeremy Bentham (1748-1832) and John Stuart Mill (1806-1873).

Jeremy Bentham – a jurist, economist and social reformer – headed the group of 'Philosophical Radicals.' The group canvassed the principle of utility. Utility has to do with the usefulness or value of a thing, a product, a policy, etc. The utilitarian school of jurisprudence propounds that utility is the standard for measuring the propriety of our conduct or approach. Similarly, the significance or usefulness of a law is determined by its capacity to meet the needs and aspirations of the people.

According to Bentham, law has utility which satisfies the greatest happiness of

the greatest number. This is another way of saying that a law would be taken as acceptable or achieving its welfarist purpose where it caters for the interest of most of the people in the society.

In this Unit, we shall be looking exclusively at Bentham's contribution to utilitarianism by examining such issues as the utilitarian principle, quality of legislation, measuring happiness, etc.

2.0 OBJECTIVES

At the end of this Unit, you should be able to:

- Appreciate the role of the utilitarian principle in the decisions made by individuals and governments;
- Assess the quality of existing laws; and
- Evaluate the possibility or otherwise of measuring the happiness of people.

3.0 MAIN CONTENT

3.1 UTILITARIAN PRINCIPLE

Jeremy Bentham subscribed to the command or the imperative theory of law which was popularized by John Austin. Such theory sees law as the will of the sovereign who is superior to the addressees of the law, which law is backed by sanctions. Thus, he defined law as:

> An assemblage of signs declarative of a volition conceived or adopted by the Sovereign in a State, concerning the conduct to be observed in a certain case by a certain person or class of persons, who in the case in question are or are supposed to be subject to his power.

And he defined a sovereign as:

> Any person or assemblage of persons to whose will a whole political community are (no matter on what account) supposed to be in a disposition to pay obedience and that in preference to the will of any other

person.

As the foregoing would have revealed, Jeremy Bentham was a positivist who, in the tradition of other fellow travellers in the positivist train, disdained natural law because its metaphysical claim was unverifiable. Thus, he derided natural law as 'nothing but a phrase' and natural rights as 'nonsense upon stilts.' But that is not to say that he was not interested in the welfare of human beings. If that was the case, he would not be associated with the greatest happiness of the greatest number. Note that all he sought to do was to demonstrate that anything that is beyond human observation or experimentation was not worthwhile.

He introduced his principle of utility by alluding to the senses of pleasure and pain. According to him, the most important quality of human beings was their sentience, that is, their ability to feel pleasure and pain. He believed the two (that is, pleasure and pain), to be, self-evidently, masters of mankind. In his *Introduction to the Principles of Morals and Legislation (1789, 1832), he* adumbrated as follows:

> Nature has placed mankind under the governance of two sovereign masters, pain and pleasure. It is for them alone to point out what we ought to do, as well as determine what we shall do. On the one hand, the standard of right and wrong, on the other the chain of causes and effects are fastened to their throne. They govern us in all we do, in all we say, in all we think.

What he is saying here is that the destiny of man is held hostage by pleasure and pain. It is either he is in pleasurable condition or he is suffering from some pain. In other words, man's life is conditioned by his response to the stimuli of pleasure and pain. Man would do those things from which his pleasure derives while at the same time refraining from activities that are a source of his pain. Pleasure of the senses includes riches, power, friendship, good reputation and good knowledge. Conversely, pain of the senses includes privation, enmity, bad reputation, malevolence, and fear. Bentham asserted that the pleasure derivable and the pain emanating from one's act were the influential factors in one's decision as to whether to do it or to omit doing same.

To anchor this theory is the principle of utility or the utilitarian principle. Utility is the quality of an object or action which imbues it with the capacity to produce some good, satisfaction, happiness or benefit on the one hand, and to prevent or reduce pain, evil or mischief on the other. In other words, utility has to do with the usefulness of an act or item to an individual. A product is said to lack utility if it is not useful or where its uselessness is more than its usefulness. The principle of utility is the barometer for measuring or evaluating all action. Bentham explains:

> By utility is meant that property in any object, whereby it tends to produce benefit, advantage, pleasure, good or happiness (all this in the present case comes to the same thing) or (what comes again to the same thing) to prevent the happening of mischief, pain, evil or unhappiness to the party whose interest is considered: if that party be the community in general, then the happiness of the community; if a particular individual, then the happiness of that individual.

As the principle can be used for an individual action so can it be utilized to measure or gauge the goodness or badness of the law of a State. Therefore, any law that benefits most people or most people in a class of the society has utilitarian value and should be promoted. Where, however, such law imposes burdens on most people, then it fails the test of utility and should be rejected. So, according to Bentham, a utilitarian law is that good law that satisfies the greatest happiness of the greatest number.

3.2 QUALITY OF LEGISLATION

The principle is a roadmap to legislators in their duty of making laws to regulate the conduct of the people, and a guide in the relationship between the people and the government. In law-making, Bentham distinguished between the science of *legislation and the art of legislation. Science of legislation is the ability of the* legislature to know the 'good'; the ability to predict the measures that could maximize pleasure or happiness, and/or minimize pain or misery. This would, for example, entail that the National Assembly should be able to project and evaluate beforehand the effect of enacting an Act to increase the Allocation Formula or to pass the Freedom of Information (FOI) bill.

On the other hand, the art of legislation is the ability of legislators to promulgate laws that would have the effect of promoting the good and reducing the bad. In other words, it means discovering the means of realizing the 'good.' Again, this would imply the National Assembly actually enacting or amending an existing law that would meet the yearnings and aspirations of the greatest number. Note that S. 4(2) & (3) of the Constitution of the Federal Republic of Nigeria (CFRN) *1999 empowers the National Assembly to make laws for the peace, order and* good government of the Federation or any part thereof.

It is, therefore, the conclusion of Bentham that the quality of legislation is proportionate to the ability of legislators to acquaint themselves with the intricacies of the science of legislation and the art of legislation, and to effectively put them to practice. To him, a legislation that is programmed to generate happiness for the community must:

Provide subsistence if not abundance;

Provide security. Bentham stated that this was the most important goal of the legislature. Security involves protecting man's honour, status, and property. However, because liberty was not a goal of the legislature, any conflict between the latter and security would have to be resolved in favour of security. You may draw a comparator from Nigeria under the dictatorship of the military. Upon its take-over of the reins of government, the military usually suspends or modifies parts of the CFRN dealing with matters including liberty and human rights for the purpose of 'national security.' It is under this setting that it promulgated several privative decrees such as the infamous Decree 2, which permitted the military to detain individuals without trial; and

Reduce inequalities. Note that he is credited with having said that perfect equality was a mirage.

SELF-ASSESSMENT EXERCISE 1

Describe the process whereby legislators may be able to enact legislation for the greatest happiness of the greatest number.

3.3 MEASURING HAPPINESS: THE FELICIFIC CALCULUS

But, because the utilitarian theory parades itself as scientific, how do we scientifically find out what law satisfies the greatest happiness of the greatest number? In response, Bentham stated that it was possible to accurately predict the consequences of an act and to calculate the extent to which it would promote pleasure and prevent pain. More specifically, he asserted that the intensity, devotion, purity and fecundity of the sensations of pleasure and pain are measurable. For this purpose, he developed a 'felicific or hedonistic calculus.' With this instrument, we would calculate the social totals of the amount of pleasure and pain which an action possesses.

Thereafter, there would be a quantitative summation of the happiness each person derives from the activity in question. He said that the instrument would assist us in calculating the social totals of the amount of pleasure and pain embedded in an action. Ultimately, the use of this device would guide the legislature in enacting only laws that are capable of guaranteeing the greatest happiness of the greatest number.

Bentham contended that it was possible to evaluate the pleasure and pain derivable from a particular course of conduct and arrive at a comparative comparison of both. Prof. Curzon explains the process as follows: an account is taken of each 'distinguishable pleasure' produced in a person by a given act, and of each pain similarly produced. The appropriate evaluation would consider the intensity of the pleasure, its duration, certainty and extent. Pleasure and pain would be added up in order to arrive at the good or bad tendency of an act. Individual happiness would thereafter be summed into a 'social total,' each component being weighed equally. Finally, the resulting social total would be identified with 'the common good' of society, which is the greatest happiness of the greatest number.

Note that Jeremy Bentham's theory, more specifically, his methodology of measurement, is predicated upon three assumptions:

(a) That there is accretion to the happiness of an individual where the addition made to the sum total of his pleasures is greater than the addition

to the sum total of his pains;

(b) That the general societal interest is made up of (the sum of the parts of) the interest of the people of that society; and

(c) That the collective happiness of the society is increased where the total of all pleasures of the individual members of the society is increased to a greater extent than their pains.

3.4 CRIME AND PUNISHMENT

Jeremy Bentham dwelt quite extensively on criminal law and punishment. A summary of his discourse is given below:

> The mischief of an act (or the pain produced therefrom) must be taken into consideration to the effect that the law must discourage acts which produce pain or evil.
>
> Criminal law must not be based upon the acceptance of the division of offences into mala in se (acts which are wrong in themselves) and mala *prohibita (acts which are wrong because the law prohibits them). An act* cannot be wrong in itself; its wrongness becomes manifest only in consideration of its consequences. Where, therefore, an act does not produce any harm, it should not be the subject of prohibition let alone sanctions.
>
> Upon the basis of the principle of utility, to punish is to inflict suffering on an offender, a step that increases the sum of evil. But the overall object of the criminal law ought to be an increase in the community's total happiness. Therefore, if, in the name of the community, punishment is to be administered, it must demonstrate that the resulting pain will help to prevent greater general pain. Thus, punishment has utility if and only if its eventual outcome results in greater happiness for the whole community. It is in this connection that retribution is derided as being of no value.
>
> Where compensation can be ordered to be paid, the imprisonment or punishment of the offender is unnecessary.

Punishment ought to be severe enough to outweigh any profit likely to be gained by the offender. A practical example is the EFCC Act 2004. It, inter *alia, punishes money laundering and authorizes the seizure, freezing,* confiscation and forfeiture of assets derived from corruption and other financial crimes. In order to properly enforce the suggestion of Bentham, offenders must not only be imprisoned; assets they derived from their criminal endeavours must be confiscated or forfeited so that the economic motive of crime would be erased. In other words, the confiscation or forfeiture must restore the offenders to the status quo ante bellum.

SELF ASSESSMENT EXERCISE 2

With the aid of felicific calculus, consider the feasibility of measuring pleasure and pain.

3.5 CRITICISMS OF BENTHAM

(a) Impracticability of Utilitarianism

Philosophers, jurists, psychologists and political scientists have condemned Bentham's philosophy in unison. One of the reasons for such condemnation is the fact that pleasure and pain are highly subjective phenomena. Secondly, the consequences of an action may not immediately result in pleasure or pain. So, in this case, Bentham's theory would have no base to rest. Moreover, it is obvious that the plank of utilitarian theory rests on the foundation that it is possible to predict effects or consequences of the particular action or law so as to allow antecedent evaluation of whether or not the action or law would achieve or yield maximum pleasure or minimum pain. However, human nature reveals that it is impossible to clearly see the future well ahead of time today. Therefore, such prior evaluation is unrealistic.

(b) Imperfections of the Felicific Calculus

His measuring device is incapable of measuring the sum total of pleasures and pains because the two-some are too subjective to be so measured. The

quantitative calculability of happiness or pain has been found to be empirically indefensible. Therefore, the principle of utility may, afterall, not be objective and not better than moral principles canvassed by Natural Law thinkers.

Recall the derogatory remarks Bentham had made against natural law and natural rights because they are incapable of proof. It is trite that inability of scientific proof is the major downside of the natural law school. But for a positivist like Bentham, who propounded utilitarianism as an alternative to the inadequacies of natural law, to resort to a method of proof which is, itself, in need of proof is, to say the least, a disservice to the positivist movement.

His utilitarian principle has even been interpreted as a little more than a restatement of the natural law doctrine. According to Schumpeter in his *Scholastic Doctors and Natural Law P hilosophers (1954), utilitarianism is* 'the shallowest of all conceivable philosophies of life.' He contends, inter *alia, that utilitarianism is a philosophy of life establishing a scheme of* 'ultimate values' – pleasure, happiness, the greatest happiness of the greatest number. He concluded that the theory has about it an aura of the 'universal and immutable' values associated with classical natural law.

(c) Factors Determining Desires

Jeremy Bentham did not mince words in his description of the science of legislation and the art of legislation about what legislators should do to enact a good law or a law that satisfies the greatest happiness of the greatest number. It has been described as a consumer model of law in that the theory presupposes that the legislator would go shopping for the best law to enact by holding consultations with stakeholders, evaluating the pros and cons before coming to the conclusion of adopting one form of law or another. No matter the nobility of this exercise, it must be noted that it is highly unrealistic.

It is true that legislators may receive several memoranda from interest groups on the utility of a particular bill. They may also consider a wide-

range of options including efficiency, convenience, their selfish interests, etc. But it so happens that in the great majority of cases they are interested neither in the science nor in the art of legislation. We are living witnesses to how lobbyists steal the show especially in their attempts to make legislators pass a law favourable to their businesses. This is believed to have happened in the petroleum industry bill, and in the regulation of GSM operators.

Also, it is the case in many developing States that legislators hardly think of national interests or the interests of their compatriots. In Nigeria, recall that the FOI bill has had a chequered history in the hands of the National Assembly. Its passage was delayed not necessarily because the legislators wanted to exercise caution in the passage of a bill that might be invasive of people's privacy but because they were scared stiff that the law could be a potent tool in the hands of Nigerians against public officials who have routinized the plunder of national wealth. Notice also that despite large scale poverty in the land and the freezing of the FOI bill, the law makers (with the collusion or assistance of the Revenue Mobilisation Allocation and Fiscal Commission) overpay themselves handsomely from the national treasury. Recall also that the Governor of the CBN, Sanusi Lamido, has revealed that the National Assembly consumes 25% of the National budget.

(d) Silence on Justice

Generally, utilitarianism is a moral philosophy which seeks to provide a theory of justice. However, Bentham reduced utility to issues of happiness, pleasure and satisfaction of sensual desire without paying any attention to the imperative of justice. Thus, although he focused much on criminal law, he did not even bother to discuss the principles of justice which ought to determine the rightness or wrongness of punishment. It is believed that a discussion of penological theories (as he did) without reference to the justice underlying them is foundationally defective. He dismissed the notion of justice as a fantasy which was created for the purpose of convenience.

(e) Utilitarianism: Majority versus Minority

It is easy in our socio-economic and political discourse to render analyses by reference to the majority. For example, democracy is majority rule. In the same vein, the utilitarian theory propounds the greatest happiness of the greatest number. This is another way of saying that an action or law is worthwhile if it satisfies the interests of the majority. But what then happens to the minority? The majoritarian theory is a theory that satisfies the majority and dissatisfies the minority. In other words, minority interests can be sacrificed on the altar of majority interests. The utilitarian theory is undermined by its promotion of the interest of the majority over that of the minority.

4.0 CONCLUSION

The principle of utility as propounded by Bentham is one which seeks to guarantee the welfare of the greatest happiness of the greatest number. Its remit is to use law as an instrument for realizing the common good. As a principle based on majoritarian rule, it is or ought to be relevant in contemporary times where democracy appears to have been widely accepted as the basic minimum for any modern society desirous of development and progress.

However, most of the routes that Bentham charted for the materialization of the principle are highly contentious and subjective. For example, the felicific calculus for measuring pleasure and pain has no foundation in scientific endeavour. It is, at best, a mental construct.

Well, by and large, it cannot be taken away from Bentham that his principle of utility is one which appears to have succeeded in jolting complacent States and governments to the need to make some forms of welfarism or even good governance the focal point of governance.

5.0 SUMMARY

In our consideration of the utilitarian principle of Bentham, we looked at the quality of legislation, measurement of happiness, crime and punishment, and the

criticisms of the principle.

Utility refers to value derivable from an action, conduct, policy, law, etc. Bentham believed that man is the servant of pleasure and pain. Whatever he does reflects his preference for pleasure or aversion to pain. In enacting legislation, legislators should be mindful of the science of legislation and the art of legislation so that the product of these endeavours would be able to cater for the greatest happiness of the greatest number. Because a good law should seek the greatest happiness of the greatest number, that is, by increasing pleasure and reducing pain, imprisoning an offender is justified only where there is no other way of punishing him such as the payment of fine, confiscation or forfeiture. The felicific calculus is a device for measuring the quantum of pleasure and pain of the individual members of the society and, ultimately, of the society as whole.

However, the principle has generally been castigated for being impracticable. More specifically, his felicific calculus is upbraided as unrealistic. Similarly, Bentham has been faulted for his failure to appreciate the fact that desires, pleasures and pains vary from one person to another. Moreover, Bentham is cited for contempt for justice. He failed to give a pride of place to his principle. Lastly, his theory is criticised for its concern about majority to the detriment of the minority.

6.0 TUTOR-MARKED ASSIGNMENT

The criticisms of the methodology of Bentham are so overwhelming as to discredit the entirety of the utilitarian principle. Discuss.

7.0 REFERENCES/F URTHER READINGS

1. Austin, M. Chinhengo, Essential Jurisprudence (Great Britain: Cavendish Publishing Ltd, 1995).
2. L. B. Curzon, Jurisprudence (London: Cavendish Publishing Limited, 1998).

Unit 2 UTILITARIANISM (2)

CONTENTS

1.0 INTRODUCTION

Bentham's utility principle has been severely criticized. In order to ameliorate such severity, Mill attempted to render a revision by rejecting or reforming the approaches of Bentham.

This Unit will consider the way and manner he set out to do this by considering his position on how the interplay of pleasure and pain could engender the greatest happiness of the greatest number. Also, we shall look at his appreciation of justice which Bentham ignored or treated with contempt.

Thereafter, the Unit would consider individual utilitarianism vis-à-vis social utilitarianism with a view to locating areas of their common grounds, and areas of divergence. It will subsequently attempt harmonization of the two sub-theories.

2.0 OBJECTIVES

At the end of this Unit, you shall be equipped to:

Critique Bentham's utilitarianism;

Assess the place of individual utilitarianism in contemporary societies; and

Explore the pros and cons of individual utilitarianism and social utilitarianism.

3.0 MAIN CONTENT

3.1 J.S. MILL'S RESTATEMENT OF UTILITARIANISM

John Stuart Mill was a logician, economist and philosopher. He is popular for having amended or reformed the extremism or inadequacies of Bentham's theory of utilitarianism. Professor Curzon observes that against the background of the severe deficiency of the Bentham's utilitarianism, Mill erected his edifice of restatement, restating and qualifying Bentham's utilitarianism.
Generally, Mill disclaimed Bentham's quantitatively utilitarian approach with some poetic lines as follows:

> It is better to be a human being dissatisfied than a pig satisfied;
> Better to be a Socrates dissatisfied than a fool satisfied.
> And if the fool or the pig is of a different opinion,
> It is because they only know their own side of the question;
> The other party to the comparison knows both sides.

Mill refined Bentham's theory through his qualitative (as against quantitative) approach. We shall summarize the fundamentals of such refinement as follows:

(a) Source of Happiness/Satisfaction

Bentham argued for the maximization of happiness and the minimization of misery in physical, sensual pleasure. To him, there were other sources of happiness which were non-physical, and which provided as much satisfaction as pleasures of the sense. He stated that the measurement of pleasure or pain can be made not only quantitatively (as Bentham did) but also qualitatively.

He asserted that quality is as much important, if not more important, than the quantity, and that small amounts of pleasures may be more satisfying than large amounts of other, less refined, pleasures. Bentham considered

only physical sensation of pleasure and pain (sentience). Mill believed that intelligence, rather them sentience, was a more important characteristic of human beings.

(b) Mill rejected the use of utilitarianism for selfish, hedonistic ends. In its place, he advocated the altruistic approach whereby people will, in their pursuit of happiness, be encouraged to secure the happiness of others because, in so doing, they secure their own happiness. In other words, even when you are primarily aiming at your own interest, you should not ignore the interest or happiness of others. By this Mill meant that the search for happiness should be principally predicated upon a consideration of the welfare or interests of others, the relegation of self and the promotion of collective happiness.

(c) Recall that we noted the fact that justice was never the preoccupation of Bentham because he dismissed it as a fantasy created for the sake of convenience. But Mill thought otherwise. To him, justice occupied a central position in balancing social considerations of utility and individual considerations of liberty and equality. He believed that such approach would increase societal justice.

SELF ASSESSMENT EXERCISE 1

To what extent was Mill able to reform Bentham's principle of utility?

3.2 INDIVIDUAL UTILITARIANISM AND SOCIAL UTILITARIANISM

3.2.1 Individual Utilitarianism

Individual utilitarianism is utilitarianism from the perspective of the individual. It is based on the will of the individual or the individual's selfish interest or ambition. Immanuel Kant (1774-1804) laid the foundation for the theory of individual utilitarianism. Herbert Spencer (1820 – 1907), a proponent of laissez *faire (free enterprise), adumbrated this arm of utilitarianism. In his discomfiture* with the hindering power of social or societal norms, he emphasised self-actualisation of the individual. His views on free enterprise coincide with social

Darwinism – the theory of the survival of the fittest.

Note that most, if not all, legal systems permit individuals of full legal capacity to exercise their will as it suits them. This manifests in several legal endeavours such as the law of contract, wills, marriage, etc. However, in deference to social utilitarianism, there are, for instance, certain contracts that would not be recognized under the law by reason of their being outright illegal or contra bonos *mores. Such would include the contract to rob a bank or to bomb a part of the* country.

Mill, another exponent of individual utilitarianism, says that over his mind and body, man is sovereign. To him, human beings should act out their passions or do the bidding of their hearts provided they do not interfere with the happiness or rights of others. In other words, there should ordinarily be nothing inhibiting man from what he is minded to do save for the proviso that he must realise that his capacity or right to do so stops where the right or interest of his neighbour begins. Take, for instance, the CFRN 1999. Therein, S. 41 guarantees the freedom of movement of the individual. The logical extension of my freedom of movement is my right to swing my hand around me. It is, however, limited by my obligation not to commit assault or battery upon my neighbour. The essence of individual utilitarianism is that since the individual knows best what he wants, he and he alone should generally be the determinant of his action or conduct.

Recall that, in the context of the enforcement of morality, Mill designed the harm *principle. It is to the effect that the only purpose for which power can rightfully* be exercised over any member of a civilized community against his will is to prevent harm to others. To him, the individual should have liberty, or freedom of action, in relation to activities that are harmless to others. However, the need to do justice or fairness to others grounds the necessity for restricting the scope of individual action.

Note also that in 1959, the UK Wolfenden Committee Report recommended the legalization of homosexuality between consenting adults in so far as the act was done privately. The arguments of the Committee harmonized with that of Mill. Essentially, the argument was that since the act was done in camera, public decency was neither outraged nor harmed.

Note again that proponents of individual utilitarianism will uphold suicide, abortion, dissent, homosexuality, same-sex marriage, euthanasia, etc because each of these conducts primarily or fundamentally, if not wholly, harms the individual concerned. They would believe, therefore, that any legislation inhibiting individuals from doing any of these, or punishing them for doing so, indicates society's or government's undue interference or unjustified paternalism in running the affairs of persons of full capacity.

3.2.2 Social Utilitarianism

Social utilitarianism is the flip side of individual utilitarianism. Though recognizing the individual passion to be a master of his destiny, it asserts that because such individual is a social animal, living in the community of his neighbours having various passions and interests, his capacity for freedom of action is necessarily limited. In other words, social utilitarians insist that because man is not an island, his selfish interest must, in deserving cases, be overshadowed by the general interest.

Bentham was a complex personality. He was ordinarily an individual utilitarian but, with his reference to welfare and, most important, community happiness, he was a social utilitarian. This was evident by his popular mantra, the greatest *happiness of the greatest number. He was concerned with the act or the law that* could meet the needs of as many people as possible in the society. In advancing such societal interest, Bentham implied that the interest of an individual, a few individuals, or a minority, was worth sacrificing on the altar of the happiness of the greatest number of people.

In this connection, refer to S.14 of the CFRN 1999 which declares that the 'security and welfare of the people shall be the primary purpose of government.' In other words, the government exists to minister to the needs of the people. Note that it does not adopt the Benthamite phrase because of its (majoritarian) limitation. In simply referring to the 'people' the section evades the controversy of why the grundnorm of the country should be concerned merely with the interest of the majority or the greatest happiness of the greatest number. Thus, the *CFRN exists to cater for the interests of all. But note again that Chapter IV of the*

CFRN delimits the generality of S. 14 in so far as it permits the promotion of public interest over private interests. For example, S. 45 allows derogation from fundamental human rights in the interest of defence, public safety, public order, public morality or public health; or for purposes of protecting the rights of other persons. It is an attempt to import policy into law making.

Social utilitarians would say that a woman cannot commit abortion because the State needs hands to work in its factories and industries. However, the individual utilitarian will respond by arguing that the society lacks the capacity to interfere with what the woman does with her body, that making or expecting the woman to breed children in that manner veritably converts her into a somewhat child-bearing factory without caring a hoot about her welfare. It would appear that this controversy, ably sharpened by pro-lifers (social utilitarians) and pro-choicers (individual utilitarians) climaxed in the famous case of Roe v Wade21 where the court tried to chart the middle course with the aid of the three trimesters.

Social utilitarians would posit that it is wrong to authorize euthanasia (mercy killing) for the benefit of a patient who is terminally ill because such form of killing may amount to cold-blooded murder, the murder of a defenceless person. But individual utilitarians would retort that such should not be the concern of the State especially when the patient's condition has been medically certified to be irredeemable, and the patient or the family authorizes a doctor to carry it out. The social utilitarians may respond that even a terminally ill patient may be healed afterall through some forms of miracles as usually happens in Pentecostal churches. Note that some States like Australia have legalized euthanasia.

In the same vein, social utilitarians will rail against suicide because it cheapens the sanctity of human life. But the individual utilitarian would see nothing wrong in it since it is the height of the exercise of will. Note, however, that in many legal systems, it is obvious that suicide, when successful, cannot be the basis of prosecution except where other persons are found to be complicit in the act. But, where unsuccessful, the actor is liable to prosecution for attempted suicide.

Social utilitarians would maintain that homosexuality, or same-sex marriage must

21 410 US 113 (1973).

be prohibited because it goes against the established institution of marriage. It would contend that approving of such union has the tendency to corrupt public morals. In response, individual utilitarians would say that in so far as such alliance is between consenting adults in private, the law has no business at all to interfere. Recall Mill's harm principle and the 1959 Wolfenden Report on homosexuality.

Social utilitarianism is alive and well in our socio-cultural milieu. For example, despite modernization, the extended family system still trumps the nuclear family system. And this happens notwithstanding the (academic) status of the husband and wife. It is only in a few cases where a couple may succeed in staving off the intrusion of the extended family members into their nuclear family. But, even then, they usually risk social ostracism. In other words, communalism still prevails over individualism. For instance, wealthy members of the society are expected to donate part of their wealth towards worthy causes in the same way as tax-paying corporations are expected to pay due regard to social responsibility, that is, by providing goods and services (that the government is legally bound to provide) to their host communities.

Recall that Nelsen Mandela was incarcerated by apartheid South African government for twenty seven years. It is highly probable that he would have breathed the air of freedom much earlier than he eventually did. The government had offered to free him several times on the condition of his abandoning the cause of the generality of the black race in South Africa. In other words, the government tried selling him the idea of the individual utilitarian that it was in his personal, narrow interest to be a free man and rejoin his family members. But, pursuant to his social utilitarian convictions, Mandela blatantly refused the offer and preferred to remain in detention. To him, his freedom was meaningless without the total liberation of the rest of black men and women. He endured and won at the end of the day. The loss of individual utilitarians was the gain of social utilitarians.

Utilitarianism considers how law can be useful or made to serve the interest of the people. Social utilitarians and individual utilitarians have made their contributions. But the two perspectives are not diametrically opposed to each other; one complements the other. Most proponents of one recognize the

necessity of the other. Both sides of the coin of utilitarianism can be harmonized by first recognizing the individuality of all, the competence of everyone to do their own thing their own way without external interference. However, such freedom will have to give way to greater societal interest in deserving cases. It is unfortunate that the freedom of the minority is sacrificed for the majority. It may be unjust or unfair. But that may be considered the social cost of societal stability.

SELF ASSESSMENT EXERCISE 2

In what way is individual utilitarianism different from social utilitarianism?

4.0 CONCLUSION

This Unit focused on Mill's reformation of Bentham's theory, and the sub-theories of individual utilitarianism and social utilitarianism. Although Bentham's brand of utilitarianism is useful for our collective existence, its unscientific approach hinders our general understanding. Therefore, Mill's intervention has been helpful, at least, to some extent.

The conflict between individual utilitarians and social utilitarians is about determining the extent of the individual or the State's freedom of action. In the spirit of laissez faire, individual utilitarianism should be encouraged. To a large extent, this is permissible in modern liberal democracies. However, because there is nothing absolute in nature or life, social utilitarianism is warranted. Although socialist systems have largely collapsed across the globe, social utilitarianism is still possible even in hard core capitalist countries. It is, therefore, no happenstance when these countries grant welfare packages to workers, unemployment benefits to the unemployed, and subsidy to farmers.

It is noteworthy that despite the encroachment that individualism has made into communalistic Africa, much of the continent remains committed to the doctrine of social utilitarianism as expressed through extended family system, social responsibility of wealthy members of the society, etc.

5.0 SUMMARY

This Unit which partly complemented the immediately preceding Unit considered Mill's attempts to amend or reform Bentham's utility principle in order to render it more sellable or acceptable to as many people as possible.

Mill did this by rejecting or adjusting some of the approaches adopted by Bentham. Thus, he substituted the qualitative approach for his predecessor's quantitative approach in the measurement of pleasure, happiness and pain. Mill also disclaimed Bentham's stance on justice by stating that justice occupied a central position in balancing social considerations of utility and individual considerations of liberty and equality.

Again, Mill passed a vote-of-no-confidence on the hedonistic bent or direction of utilitarianism. Rather, he advocated a situation where persons pursuing their individual selfish interests would spare a thought for the interest of other members of the society. In other words, Mill acted the role of a social utilitarian though he was a typical individual utilitarian.

The Unit also dwelt on the conflict between individual utilitarianism and social utilitarianism. Individual utilitarians canvass the individuality of everyone and reject undue interference from the State or government. In essence, it asks for unbridled freedom of action for the individual. Individual utilitarians support a minimalist State. On the other hand, social utilitarians, while recognizing the verity of individual utilitarianism, posit that since man is a social animal, living in the community filled with his likes, the interest of the community must be elevated over and above his. We saw this attempt at such elevation through the lens of abortion, euthanasia, homosexuality, etc.

Finally, we recall that it has indeed been possible to strike a middle course between the extremes of individual utilitarianism and social utilitarianism.

6.0 TUTOR-MARKED ASSIGNMENT

Assess the extent to which the Nigerian legal order has been able to mediate in the conflict between individual utilitarianism and social utilitarianism.

7.0 REFERENCES/F URTHER READINGS

1. Austin M. Chinhengo, Essential Jurisprudence (London: Cavendish Publishing Limited, 1995).
2. L. B. Curzon, Jurisprudence (London: Cavendish Publishing Limited, 1998).

MODULE 6 MARXIST THEORY OF LAW

UNIT 1 MARXIST THEORY OF LAW

CONTENTS

1.0 INTRODUCTION

In a legal discipline like jurisprudence, Marxism is unique because it is the only school of thought that has openly and directly denigrated law, which it considers to be a tool in the hands of the capital-owning class of the society for the oppression of the labour-selling section thereof, the proletariat. It has even predicted that some day in the future law would become unnecessary and cast out from the society forever.

Marxism, named after its main proponent, Karl Marx (1818-1883), is the intellectual wing of the political ideology called socialism. Recall that socialism stands against almost everything that capitalism stands for. Marxism is uncomfortable with the oppression by the bourgeoisie of the proletariat. It employs several sub-themes to drive home its point about the irreconcilable differences between capital-owners and labour-sellers.

In this one-unit Module, themes or sub-themes specifically considered include dialectical materialism, laws of economic production, and historical materialism, the relationships between the substructure and the superstructure, law and

capitalism, law and the State, amongst others.

Finally, we end the Unit with a critique of the Marxist doctrine.

2.0 OBJECTIVES

At the end of this Unit, you will have the capacity to:

- Evaluate the inherent contradiction amongst classes in a society;
- Assess the reality of the economic base in the development of superstructures;
- Critique the apparent failure of socialism despite the excesses of capitalism; and
- Design a roadmap towards reviving the socialist system, reforming the capitalist system, or devising a hybrid or an entirely new system that could largely ameliorate the parlous material conditions of humanity.

3.0 MAIN CONTENT

3.1 SCOPE OF MARXISM

Marxism – a term derived from its main proponent, Karl Marx, is a comprehensive and multi-disciplinary study covering disciplines such as sociology, politics, history, economics, etc. Note that there are, however, fewer writings about the Marxist school of thought because it relegated law to the background, or because it failed to give pride of place to law in its analysis of social phenomena. In addition to Karl Marx, other proponents included Friedrich Engels (1820-1895) and Vladimir Lenin (1870-1924).

Karl Marx, a son of a lawyer, was a student of jurisprudence. He got his training from the University of Bonn and the University of Berlin where he was overwhelmingly influenced by the philosophy of Hegel (1770-1831). Marx was of the view that jurisprudence is much more than static analysis and argued that the study of jurisprudence must necessarily include a study of the nature of law in a society which was in a flux, ever-changing.

Marxist definition of law is offered by Vyshinsky as follows:

> Law is the totality of rules of conduct which express the will of the ruling class and are laid down in a legislative manner, along with the rules and practices of communal life which are sanctioned by the power of the State. The application of these rules is backed by the coercive power of the State in order to secure, reinforce, and develop the social relationships and conditions which are agreeable to the interests of the ruling class.

Having come this far in the study of key topics in jurisprudence, we can note that this definition of law is consistent with that of Austin, Kelsen, etc, save for the reference to ruling class.

Marx believed that study is a means to an end, the end of revolutionary societal transformation. According to him, "up till now, philosophers have merely interpreted the world, the point, however, is to change it." He was passionate about effecting revolutionary societal change by overthrowing the existing, dominant capitalist order. Such revolution would be properly and effectively realized with the well-grounded understanding of social phenomena such as economics, politics and law. In other words, such revolution was realizable with the adoption and utilization of knowledge obtained from multi-disciplinary approach to study or learning.

His world outlook comprises the doctrines of dialectical materialism, laws of *economic production, and historical materialism.*

(a) Dialectical Materialism

> Dialectical materialism is a system of thought predicated upon a materialistic conception of the universe and the examination of the interdependence and the contradictions inherent within all phenomena. He believed that the phenomena of nature are dialectical. Dialectics (dialego – to debate, discourse) is opposed to metaphysical or transcendental speculation. And this obviously means that it stands in opposition to the doctrine of natural law. Its essential characteristics include:

(i) Nature is a connected and integral whole. The idea is to the effect that as no man is an island, nothing is an island of its own. Thus, law is connected with or depends on other phenomena. What this means is that law would have to be studied not in itself but against the background of other disciplines.

(ii) Nature is in a state of constant change. It is often said that something is as constant as the Northern star to denote stability or predictability. Marx was of the view that the only thing permanent or constant in nature was change. So, in the study of jurisprudence we cannot ignore or gloss over the reality of this change in the character of law. Put differently, the changing nature of law must beget a malleable approach to jurisprudence.

(iii) Development in all phenomena manifests in imperceptible quantitative changes which translates/transforms to fundamental, qualitative changes. This is evident by the appearance, disappearance and re-appearance of old doctrines and the emergence of new ones.

(iv) Internal contradictions are inherent in all phenomena and "struggles" between opposites, the old and the new, are inevitable. Thus, to every positive is a negative, and to every thesis is an antithesis. The effect of all this is that as you always have the other side (or the flip side of the coin), there will always be alternative, opposing views even within the same family of a particular theory. Therefore, it would not be strange in the family of positivists for Prof. Hart to reject or to severely criticise John Austin's command theory of law. Similarly, it would be normal for legal philosophers to have varied and contentious views on fundamental concepts in jurisprudence.

According to Marx, the interpretation of those phenomena is materialistic because matter is the basis of existence. Materialism contrasts with philosophical idealism; it rejects metaphysics or transcendentalism. To Marx, the world is matter or material. Matter is primary, mind is secondary. Mind is

a reflection of matter. The mind derives from matter, not the other way round. The two are inseparable. The world and its phenomena are entirely knowable through experiments, observation, etc. Knowledge obtained can lead us to the objective truth. This process of knowledge acquisition brooks of no eternal principles that natural law philosophers are wont to make us believe.

(b) Laws of Economic Productions

Marx posited that production in a capitalist system is based on a system whereby the bourgeoisie exploit the proletariat who rely on the sale of their labour for subsistence existence. The former owns or monopolizes ownership of the factors of production (such as capital, land, industries, factories, etc.) and all the latter has to do to carry on with their miserable existence is to play second fiddle. This they do by working for the oppressors or exploiters and in the process sweating it out to produce the goods and services that the employers of labour will sell for money.

He argued that inexorable economic laws determine and regulate production of goods and services. Those who own the instruments of production (the capitalist class) derive surplus value from the labour of those who have nothing but their labour power to sell (the proletariat). From the cheap labour offered by the proletariat, the capitalist class amass excess products and profits. The greed or hunger or thirst for profits and more profits propels the capitalists to exploit the proletariat.

In no time, such exploitation would trigger chain reaction of economic crises and the discontent and disaffection of workers. At this stage, the society would be polarized along the lines of them and us, the haves and the have-nots. Thereafter, workers will mobilize to confront the capitalist class, and to "expropriate the expropriators." Ultimately, the capitalist or the bourgeois society shall disappear. Workers' success would be a function of a combination of factors including their consciousness, and the inherent contradiction in the unjust order of capitalist exploitation. Marx would usually say that the capitalist class produces its own grave-diggers. What he meant by this was that the nature of greed and excesses which was inborn in the capitalist class was always sure to produce a set of circumstances that

would enhance the challenge and the overthrow of the system as a whole.

(c) Historical Materialism

Marx contended that the history of society is the history of class struggle. In other words, there has always been and there will always be struggle on the basis of class. Your class would determine the nature of your contribution to the struggle. Recall the radical or progressive slogan of students from tertiary institutions aluta continua victoria ascerta. He stated that the mode of production (that is, the understanding of whether you are an employer or a capitalist or an employee, labourer, proletariat) determines the general process of socio-economic, political and intellectual life. As he would say, 'it is not the consciousness of men that determines their existence, but their social existence that determines their consciousnesses.' What this means is that your response to your environment is not conditioned by your own nature as a person or as a human being but by your own status, standing or placement in the social rung of the societal ladder. The nature of capitalism generates or makes conflict inevitable. And revolution will occur only when the contradictions created by capitalist mode of production cannot be solved or resolved.

SELF-ASSESSMENT EXERCISE 1

Critically assess the doctrines of dialectical materialism, laws of economic production, and historical materialism.

3.2 SUB-THEMES IN MARXISM

Marx also dwelt on issues or sub-themes relevant to the three themes we have considered already. We shall look at them below:

(a) Base and Superstructure

In realizing that economic foundation is the real basis of any given social order, he contrasted the base or substructure with the superstructure. The base is the foundation of the social consciousness of human beings in the society.

You may call the base your economic strength, your financial power, your wealth. It determines the superstructure, that is, every other thing that has to be supported by the base. Upon the substructural foundation, society builds or erects its legal, political, social and moral superstructure. Superstructure includes ideas, ideology, theories, philosophy, beliefs, etc. As time and chance happen to everything (Eccl. 9:11), material conditions of life happen to the superstructural paraphernalia of all. You may need to look around you to see how the substructure conditions the superstructure. For example, the base determines the superstructures of your social status, thinking, the kind of friends you keep, the make of cars you ride, where you live, the kind of schools your children attend, etc. In fact, the base is the be-all-and-end-all because, in its absence, the superstructure would be in a sorry state.

(b) Law and Capitalism

Marx noted that jurisprudential theories, law, rules and regulations are not a happenstance; they did not emerge from the blues or by accident. He said that they developed or were created in response to the needs of the ruling class. Similarly, he had stated that religion, ethics, art and jurisprudence perform functions which help to maintain, sustain and stabilize the capitalist order for the good and security of the capitalists. He rejected the assertion that they reflect or mirror the 'eternal categories' and added that they eventually change with the change in the perceived needs of the ruling class.

Recall that Marx attested to the inevitability of exploitation and struggle in a capitalist society. In relation to law, he stated that law reflects the class struggle between the ruling class and the proletariat. Because power equation favours the dominance of the interests of the ruling class, the law comes in handy as an instrument for perpetrating such dominance. Laws, statutes, rules and regulations, and judicial interpretation thereon are packaged together to enhance capitalist control of the proletariat. They are legal apparati employed and deployed by the ruling class to advance their economic and political *status quo.*

Marx maintained that his argument remains valid no matter how beneficial and disinterested the law may be. According to him, a neutral, disinterested

jurisprudence is a fiction and concerns for 'natural rights' or the 'rights of property,' is a mask for intellectual endeavour geared towards maintaining a regime of economic exploitation. He stressed further that in as much as law and jurisprudence satisfy or fulfil the requirement of the dominant economic class, they legitimize existing social structure to the detriment of the proletariat.

(c) Law and State

Marx asserted that the State is a superstructure erected upon an economic basis. In other words, the base determines the State you have, or the nature of the State. In the beginning there was no State. State came into existence with the emergence of classes in the society. T he state is merely 'the executive committee of the bourgeoisie,' ruling on its behalf and using coercive legal apparati against non-conformists. According to Engels, the State is "the form in which the individuals of a ruling class assert their common interests, and in which the whole civil society of an epoch is epitomized".

Jurisprudence or law assists the State with the ideology which, under the pretext of an objective analysis of the role of the State, justifies or rationalizes its dominant, exploitative role and objectives.

All phenomena, including the State, are subject to change. The State is, afterall, not external or sacrosanct. But note S. 2 of the CFRN 1999 on the indivisibility and indissolubility of Nigeria. Marxists predict that the State will wither away when a victorious revolution replaces "the government of persons by the administration of things." In the disappearance of classes following a successful revolution, law will fall into disuse. Exploitation and poverty – the foundational causes of crime – will vanish in a classless society. The State will disappear piecemeal. In the transitional period from capitalism to socialism, new forms of law and jurisprudence will be needed. Proletarian law would rule and reign until the proletariat finally overthrow the capitalist. Subsequently, law will be unnecessary.

(d) Some Diversions

Marxists believe it to be a waste of time when workers believe piecemeal improvement in welfare package can take them anywhere. Late Afro-beat king, Fela, alluded to this in one of his songs. They believe that asking for improvement in social rights in the name of revolutionary struggle is to confuse means with ends. They contend that achieving social rights, or equal pay are mere diversions (means) in the journey to the main destination of a totally classless society (end). They note that striving for change in the law ignores the fundamental purpose of all law in a bourgeois society, which is to support existing social structure. Also, they observe that the rule of law was a decoy to lull the oppressed into the belief in the neutrality of law and the apoliticality of jurisprudence.

SELF-ASSESSMENT EXERCISE 2

To what extent does Marxist account on the relationship between the substructure and the superstructure coincide with the socio-legal reality in Nigeria?

3.3 CRITIQUE OF MARXISM

Marxism has been much enriched by its multi-disciplinary approach. And because the doctrine focuses on the material conditions – of most labourers, workers, employees, the downtrodden, the dispossessed, etc, – across the globe, it commands universal appeal. However, its blueprint for the overthrow of capitalists is highly controversial and debated.

Basically, Marxism scorns the discipline of law because it sees it as filled with capitalist values, because it ministers to the welfare of the capitalist creed. With this mindset, it could not recognize the crucial role law could play in enhancing the lots or boosting the material conditions of the proletariat. Notice that there have been cases where genuine legal reforms in some legal systems have, in fact, elevated persons who were hitherto proletarians into the capitalist class. This implies high social mobility. And if there is such mobility, proletarians will not answer Marxist call to effect revolution in the society.

Marxism does not pay any regard to human rights, or rule of law. It may not be a coincidence that the countries that subscribed to the doctrine were ruled by dictators who oppressed the people under the guise of instituting an egalitarian, classless, socialist or communist system of governments. Contemporary examples include North Korea, Cuba, etc.

Also, despite the beauty of the Marxist design, it has not stood the test of time. It is true that the gross inadequacies of the capitalist system justify alternative system of statecraft, including Marxist socialism. But because of the inherent contradiction in the ideology, it lost its relevance. For example, the ideology promoted the introduction of a classless society despite the fact that inequality is a fact of life. Again, it advocated the abolition of law notwithstanding the time-honoured reality that a society lacking in rules and regulations is one propelled by social Darwinism (survival of the fittest), and driven by Hobbesian state of nature where life is short, nasty and brutish. Such society is inherently anarchic.

Note that the internal contradiction of the ideology probably led to its collapse in the USSR, former Eastern Europe (including Poland, Bulgaria, etc.) towards the end of the 1990s. What the collapse probably demonstrated is the failure of the socialist system. It is worthy of note that the countries in question have now embraced liberal democracy and capitalist ideology.

4.0 CONCLUSION

In this Unit, Marxists contended, inter alia, that the society is characterized by class struggle between the capitalist class and the proletariat. The proletariat would ultimately prevail, we are told. In their victory, the proletariat will replace the dictatorship of the capitalist class with the dictatorship of the proletariat. The State would wither away, the society would become classless while the law would become history.

The Marxist manifesto on the order of events leading to the ultimate overthrow of capitalism would gladden the hearts of the billions of world population who are smarting it out under the jackboot of capitalism in their daily existence. We believe those who lived during the lifetime of Marx were similarly moved. And many States actually tried to implement the Marxist doctrine.

Unfortunately, those who did crashed out; they got their fingers burnt. They were in Africa, in Asia, Europe, etc. The collapse of the enduring flag bearer of socialism – former USSR – appeared to have sounded the death knell of any pretence to the viability of this system of governance.

Now that the whole world appears to have gone democratic and capitalist, is Marxism or socialism dead? We ask this question amidst the intolerable excesses of capitalism such as the failure to adequately cater for the poor, the weak and the needy. Capitalism is the modern version of social Darwinism, the survival of the fittest. It is worse when such paradigm tends to assume Hobbesian state of nature where life is short, nasty and brutish.

So, to our question again: is socialism dead? Can capitalism reform to inject good doses of welfarism into its cruel system? Time surely will tell.

5.0 SUMMARY

The Marxist school of jurisprudence was propounded mainly by Karl Marx. He believed in the utility of multi-disciplinary approach in the study of phenomena. He was passionate about effecting revolutionary societal change through the overthrow of the existing, dominant capitalist order with the aid of knowledge acquired from multidisciplinary sources.

Against this background, he propounded three doctrines including dialectical materialism, laws of economic production, and historical materialism. He continued by stressing the relationship between the substructure and the superstructure, and asserted that the latter was but a mere reflection of the former.

He said that law is a tool for the promotion of capitalist ideology for the benefit of the bourgeoisie but to the detriment of the proletariat. Similarly, he posited that law was at the service of the State for the perpetration of the interests of the dominant class – the capitalist class.

It is the submission of Marxists that at a time in the future when the inherent contradictions within the capitalist system becomes excessive, and triggers

proletarian reaction or revolt, the latter would ultimately succeed in dethroning the former. At this stage, the State will wither away, the society will become classless, and law will cease to exist.

6.0 TUTOR-MARKED ASSIGNMENT

Evaluate the statement that the excesses of capitalism will provoke the resurrection of Marxist ideology across the globe.

7.0 REFERENCES/F URTHER READINGS

1. Austin M. Chinhengo, Essential Jurisprudence (London: Cavendish Publishing Limited, 1995).
2. L. B. Curzon, Jurisprudence (London: Cavendish Publishing Limited, 1998).