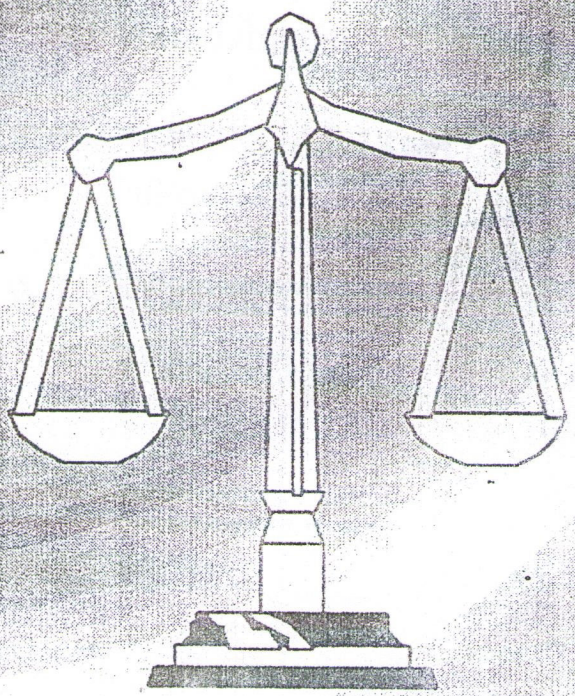
THE LEGAL SCIENCE REVIEW



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ARTICLES:

SELF-DETERMINATION IN CONTEMPORARY INTERNATIONAL LAW
- Professor K. Abayomi Dinakin

THE DOCTRINE OF LEGAL POSITIVISM RE-EXAMINED
- Dr. Maduabuchi Dukor

ABOUT LAW IN CONTEXT: FEMINISM
- Oghenemaro F. Emiri

COMMENTARY ON LAW:
- Dr. Rufus O. Olaoluwa

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COMMENTARY ON LAW

R.O. OLAOLUWA[1]

Law in the most general sense of that word is a central problem of legal philosophy or theory. Numerous attempts have been made at verbal definition but probably no definition is satisfactory or would secure universal acceptance[2]. In its general and abstract sense, law is used as designating generalizations explaining the instances of observed invariable phenomena, stating what in certain circumstances always happens e.g. the law of gravity, the law of demand and supply, the law of thermodynamics, law of nature, and the like[3].

Despite this established usage, the significant difference is that these statements are descriptive of natural happenings and not like laws of political societies, prescriptive of human conduct.

In its technical meaning particular to human society, law is the written and the unwritten body of rules largely derived from custom and formal enactment which are recognised as binding among those persons who constitute a community or state, so that they will be imposed upon and enforced among those persons by appropriate sanctions[4].

The detailed content of a particular system or body of laws will vary from one society to another being influenced by the history and religious, social, moral, political, economic, and other philosophy, predominant in the society at the time of the development or reformation of particular rules. The existence of this diversity gives rise to the study of comparative law, and to the problems between municipal and international law and law reform.

In its technical meaning, law has some characteristic features by which it can be recognised. These features include the following[5]

1) It is an attribute of human beings and found only when groups of such beings have associated and organised themselves into a political society, that is, one for governing themselves. Thus, law cannot be regarded as God given in the

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2. U.S.F Nnabue; *Law and Legal Process,* Abuja, Bons International Book Centre, David Walker: *The Oxford Companion to Law:* Oxford, Clarendon Press, 1980, p. 716
3. David Walker, Ibid. Also see A Getmanova, M. Panov and V. Petrov: *Logic Made Simple Dictionary,* Moscow, Progress Publishers, 1990, p. 181.
4. F. Adaramola: *Basic Jurisprudence*, 1992, pp. 5-7. Also see L.B Curzon *A Dictionary of Law,* Macdonald & Evans 1983, p. 211
5. O.A Sanni (ed) *Introduction to Nigerian Legal Method,* Ile-Ife, Kuntel Publishing House, 1999, p. 2-3. Also See David Walker, Ibid.

sense of the Ten Commandments contained in the Holy Bible[6] or Koranic rules and injunctions. The above statement however does not deny or minimise the importance of religious beliefs and values in motivating societies to adopt particular rules of law.

The need for man made law arose as a result of scarce food and other material things needed for human survival. As such law is a body of different rules. Since law is man made, man has the responsibility to determine to a large extent the content of the law of his society and take responsibility for it as he cannot blame God or nature for the effectiveness or otherwise of the law.

2) Law is not descriptive of happenings like the so-called laws of the natural sciences, but prescriptive of human conduct or normative. It is concerned not with the *is* but with *ought*[7] i.e. with what a man should or must not do in particular circumstances and with what is to happen if he deviates beyond permitted limits of conduct. It is a principle of order, rule and measure of human acts and relations.

3) Law has element of sanction or coercion enforced by the institutions of law enforcement like the Police Force, Tribunals, Law Courts, Prisons etc when and where there is a breach of the law. Legal sanction is the main distinguishing factor between legal rules and moral, ethnical or scientific rules which are always left to the vagaries of contending non-legal enforcement processes.

4) Law has territorial application. Law is usually made to guide human conduct in a particular country and is binding on the persons and properties within that country. For instance, while the Land Use Act 1978 as amended regulate the land tenure system in Nigeria, the Criminal Code and the Criminal Procedure Act apply in Southern Nigeria and the penal code and the criminal procedure code apply in Northern Nigeria. But the universality of international law make it to apply to two or more countries equally despite the fact that there are marked objective differences depending on their respective needs in socio-economic, cultural, religious and other values. For instance, the Vienna Convention on Diplomatic relations[8] apply equally to all sovereign states. In this case, there is no territorial limitation as we have in municipal laws.

5) Law is not static but dynamic. Since law is meant to regulate the behaviour of man in society, the content of law of each society usually changes as the social-economic base and the political structure built on its changes.

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6. Exodus 20 verses 3-17
7. F. Adaramola *op. cit*, p. 7

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5) Law is not static but dynamic. Since law is meant to regulate the behaviour of man in society, the content of law of each society usually changes as the social-economic base and the political structure built on its changes.

Law as a legal concept cannot exist alone without being complemented by some other legal concepts like order, justice, freedom and sovereignty based on conformity or regularity with the law. This brings us to the topic of this paper which is "*law and legitimacy*". Legitimacy is a relative jural legal concept that cannot stand alone without law. For law to be legitimate, it has to conform with certain rules which are partly legal and partly political in nature.

Legitimacy is a legal concept which is not susceptible to only one definition. Legitimacy has been defined as the status of a person born to parents who are lawfully married[9]. A child born to a married woman is presumed begotten by her husband and accordingly legitimate though the contrary may be proved[10]. The same presumption arises where the child is born within a possible period of gestation after the death of the husband or dissolution of the marriage. If the paternity of such a child is otherwise given to

8. Done at Vienna April 18, 1961 and entered into force April 24, 1964.
8. David Walker, Ibid, p. 756
9. Ibid

another person not being a biological father, it will fail the repugnancy test[11].

Repugnancy rule or test is the gauge through which customary law must pass before they can be enforced[12]. For all rules of customary law are subject to certain general rules (test) of validity before they can be enforced. Thus, section 24(1) of the magistrates court law[13], Laws of Lagos State directs magistrates to "*observe and enforce the observance of every customary law which is applicable and is not repugnant to natural justice, equity, and good conscience, nor incomparable either directly or by implication with any law for the time being in force*"

The phrase "*Repugnancy to natural justice, equity and good conscience*" is to be considered as a whole and having a single meaning. In Laoye V. Oyetunde[14] Lord Wright was of the opinion that the effect of the phrase was to invalidate customs which were "*Barbarous*"[15] but the courts have very sensibly refrained from going further and indulging in philosophical discussions on the matter. They have simply been content to state their conclusion on any particular rule whose validity is challenged on this ground, without attempting to give lengthy expositions of their reasons for that conclusion[16].

The application of this principle in practice has been illustrated by many Nigerian cases. In Edet V. Essien[17] the appellant had paid a dowry in respect of a woman when she was a child. Later the

10. Olawale Ajai: Legitimacy, Paternity and Custody of Children Under Customary Law Re examined Rights of Women and Children in Divorce, Olawale Ajai & Toyin Ipaye (Mrs.) (Ed Friedrich Ebert Foundation 1997, p. 85.
11. Park: The Sources of Nigerian Law; London 1963.
12. CAP 127.
13. (1994) A.C 170 (1944) A.C 170
14. A.E.W Park: The Sources of Nigerian Law, London: Sweet & Maxwell 1963, p 70-71
15. Ibid
16. (1993) II NLR 47

respondent paid dowry in respect of the same woman to her parents and took her as wife. The appellant claimed custody and paternity of the two children of the marriage on the grounds that under customary law, he was the husband of the woman since the dowry he paid had not been repaid to him. The court held that even if it was established, it was the opinion of the court that such a custom was repugnant to natural justice, equity and good conscience. In order words, the court said that that claim was not legitimate.

In Ejanor V. Okenome[18]. This action was brought for the return of the plaintiff's daughter then in the custody of the defendants. The plaintiff claimed that he married the defendant according to Ishan customary law but that when she was three months pregnancy, she deserted him to live with his father-in-law. The father-in-law testified that the defendant became pregnant in his house and not in the plaintiff's house, because she spent nine months in his house before becoming pregnant. But the father-in-law stated that according to Ishan customary law, the child belonged to the plaintiff because the marriage still subsisted. The court upheld the Ishan customary law by awarding custody and paternity of the child to the plaintiff. The defendant appealed on the ground that the trial court was wrong in law to grant paternity of the defendant's child to a complete stranger (i.e. the plaintiff). The appellant court dismissed the argument of the counsel for the defendant who relied on the old section 147 of the Evidence Act[19] that since there was evidence of non-access to the defendant by the plaintiff, he should not have been awarded the paternity of the child. In doing this, the court found support in section 115(3) of

18. (1976) U.I.L.R pt 3 at p. 380
19. Cap 62 Laws of the Federation and Lagos 1958

the Matrimonial Cases Decree[20] (i.e. the current section 148 of the Evidence Act[21]) which in his view lent support to the Ishan customary law. The appellant court also distinguished Edet V. Essien[22] on the ground that the suitor-claimant in that case was not married to the woman.

Finally, the appellant court held that the Ishan customary court was not repugnant to natural justice, equity and good conscience. The court concluded its ruling by saying that:

> *"the custom seems to say that A cannot spend his money to marry a wife and then B seduces her and gets a child through her when the bride price paid by A has not been refunded and the marriage dissolved. I think there is justice in their reasoning and it is very useful in its practical application in the society and dismiss the appeal".*

In the case of Ogbole V. Onah[23] it was for the fact of non-access that the court refused to enforce the rule of Idoma native law and custom regarding the paternity that would have awarded paternity and custody of the child to the deceased husband of the woman. It has been stated by a legal expert that this evidence of non-access surely rebutted the presumption of legitimacy imposed by section 148 of the Evidence Act[24].

Apart from defining legitimacy as a status of a person born to parents who are lawfully married supra[25], legitimacy according to its latin origin means conforming with law or legality[26]. However, it

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20. No. 18 of 1970
21. Cap 112 Laws of the Federation 1990
22. (1932) II NLR 47
23. (1990) I NWLR (pt 126) 357 at 367
24. Olawale Ajai: Legitimacy, Paternity and Custody of Children Under Customary Law Re-examined //Rights of Women and Children in Divorce Edited by Olawale Ajai & Toyin Ipaye (Mrs) Friedrich Ebert Foundation 1997, p. 89
25. See Citation 9
26. Farrar and Dugdale: Introduction to Legal Method, London (Sweet & Maxwell) 1999, p. 11.

has since acquired a more extended meaning which covers not only conformity with valid reasoning but also the possession of some extra quality of authenticity or genuiness.

In the early period of a legal system, legitimacy may be based on charismatic qualities of particular rulers or judges. Later it may rest on the sanctity of immemorial tradition. Later still, this may be in terms of the impersonal rational authority of the law (the rule of law not men) accepted both by those who administer the political system and by the population[27].

Legality or the rule of law which developed with legislation is generated by the judicial form of social relations but immediately received a clearly expressed political colour[28].

As a purely legal factor guaranteeing the link between the rules of law and their embodiment in legal relations, legality is inherent in every normally functioning legal system in any social formation. The rule of law may therefore be of different types and each type serving the interests of certain ruling classes, and ultimately expresses the objective needs of the prevailing mode of production in legal order[29].

It is therefore part of the functions of law to prescribe the lawful and regular ways of exercising powers and functions of the state. For instance the constitution of the federal republic of Nigeria declared its supremacy and its binding force on all authorities and persons throughout the Federal Republic of Nigeria[30]. It further provides that[31]:

27. Ibid
28. L.S Jawitsch: The General Theory of Law, Progress Publishers, Moscow, 1981, p. 240
29. Ibid
30. Constitution of the Federal Republic of Nigeria 1999, S.1 (1)
31. Ibid S.1 (2)

> *"The Federal Republic of 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 the provisions of the constitution".*

It further still provided that[32]:

> *"If any other law is inconsistent with the provision of this constitution, this constitution shall prevail and that other law shall to the extent of the inconsistency be void" (i.e. that other law shall not be a legitimate one[33]).*

The above provisions clearly show that the constitution is the most supreme of all the sources of Nigerian law.

Accordingly, all other laws whether by way of common law, doctrines of equity, imperial statutes, acts of the national assembly, laws of states houses of assemblies as well as edicts of state governments and bye-laws of local government councils must all be in conformity with the provisions of the constitution in order to be valid and legitimate.

In the case of Adediran V. Interland Transport Ltd[34] the court was faced with a resolution of a conflict between a rule of common law and the specific provisions of S.6(6) of the 1979 constitution.

Under the common law rule of public nuisance, a plaintiff could only institute an action through or with the consent of the Attorney-General of a state or of the federation. Whereas S.6(6) of the constitution gives unlimited assess to court to every Nigerian for the determination of his civic rights. The Supreme Court had no difficulty in holding that the common law requirement to public nuisance conflicted with the right of assess to court enshrined in

32. Ibid S.1 (3)
33. Emphasis Mine.
34. (1991) 9 NWLR (pt 214) p. 155

the constitution. Accordingly, the court held that the common law rule was null and void for reasons of being inconsistent with the constitution.

In the popular case of Williams V. Majekodunmi[35] the appellant's movement had been restricted or curtailed by the respondent to a 3 miles radius in an area of Abeokuta. The curtailment was done through an order. The appellant argued that the restriction order violated the provision of the 1960 constitution dealing with personal liberty and freedom of movement. The court found that the order for restriction was unjustifiable. Consequently, the court nullified the order because of inconsistency with the right guaranteed under the constitution.

Furthermore, in the case of the Military Governor of Ondo State V. Adewunmi[36], the respondent had sued the Military Governor of Ondo State challenging the validity of the election to the stool of the Ewi of Ado-Ekiti. During the pendency of the case, the Governor promulgated an Edict No. 11 of 1984 which ousted the jurisdiction of the court. Adewunmi challenged the Edict as illegal, unconstitutional, null and void. The court granted the respondent the relief sought and the Governor appealed against the decision and the appeal was dismissed.

In dismissing the appeal the court per JSC ESO reasoned that "*in a federation like ours where in the constitution, the powers of such organ i.e. the executive, legislative and judiciary have been so expressly stated, recourse could only be made to preserve the federation by an observance of the provisions of the constitution*".

35. (1962) 1 All NLR, p. 413
36. (1988) 3 NWLR (pt. 82) p. 280

Under the military regimes, the issue of supremacy of the constitution (the unsuspended part) over decrees and vice versa was highly contested through the Nigeria courts. One of the most contentions of these cases is the case of Lakanmi V. Att. General of Western Region[37]. In that case the court was faced with how to reconcile provisions of the constitutions with the provisions of the forfeiture of assets of public officers validation decree No. 45 of 1968.

The appellants were among other persons whose assets were investigated by a tribunal of enquiry set up under an edict by the western regional government. Some provisions of the edict and the orders made by the presiding judge were in conflict with the unsuspended part of the 1963 constitution. The appellant challenged the provisions of the edict on the ground of inconsistency on the orders made thereunder. The appellant's claim was dismissed by the high court and the western state court of appeal. The appellant therefore appealed to the Supreme Court.

In the interim, the Federal Military Government passed the following decrees:

a. The investigation of assets of public officers and other persons decree No. 37 of 1968.
b. The investigation of assets of public officers and other persons amendment decree No. 43 of 1968, and
c. The forfeiture of assets of public officers validation decree No. 45 of 1968.

The decrees were without any doubt specifically directed against the appellants and their pending appeal

37. (1971) UNIFE L.R, p. 201 and (1974) ESCLR, p. 713

The decrees also aimed at rescuing the western regional government from its manifestly inconsistent edicts. Decree No. 45 for example validated all orders made pursuant to any enactment. The decree also removed the jurisdiction of the court from questioning the validity of any decree or anything done under any decree.

Furthermore, the decree also excluded the application of fundamental rights provision in the constitution. Finally, the decree terminated all actions and appeals pending in various courts.

At the hearing of the appeal, the appellant argued before the Supreme Court that decree No. 45 of 1968 was inconsistent with the principles of separation of powers enshrined in the constitution.

The appellant further argued that the decree amounted to a legislative judgement. He also argued that it was an unnecessary executive incursion into the domain reserved for the judiciary.

In response the respondent argued that there was nothing in the 1963 constitution which was capable of rendering a decree void for reason of inconsistency with that constitution. It was further argued by the respondents that the military government came into power in violation of the constitution. Accordingly, it was a revolutionary regime (although without revolutionary agenda) which was not bound by the provisions of the constitution.

The Supreme Court held that decree No. 45 of 1968 was a legislative judgement and therefore null and void. The supreme court further reasoned in its decision that the federal military

government was not a revolutionary government but was an interim military government necessitated by the events of January 15, 1966 when the civilian government had invited the military to take over government and restore normalcy in the federation and thereafter return power to the civilians.

On the issue of whether a change of government as a result of a successful coup d'etal is a revolution or not, the Pakistani Supreme Court had this to say in the case of State V. Dosso[38]. The court said that "*a change is in law a revolution if it annuls the constitution and the annulment is effective. If the attempt to break the constitution fails, those who sponsor or organise it are judged by the existing constitution as guilty of the crime of treason but if the revolution is victorious in the sense that the person assuming power under the change can successfully require the inhabitants of the country to conform to the new regime, then the revolution itself becomes a law creating fact because thereafter, its own legality is judged not by reference to the annulled constitution but by reference to its own success*".

The supreme courts decision in the Lakanmi's case[39] clearly challenged the legitimacy of the federal military government and it was also an affront to its law making powers. Not surprisingly therefore, the federal military government quickly reacted by promulgating a decree which effectively abrogated the negative impact of the court's decision[40].

38. (1958) 2 Pakistan Supreme Court Reports, p. 180
39. (1971) UNIFE L.R, p. 201 and (1974) ECSLR, p. 713
40. See The Federal Government Supremacy and Enforcement Decree No. 28 of 1970. The Decree made it clear that the event of January 1966 was a Revolution

According to Elias[41], customary international law recognises a coup d'etat as a proper and effective legal means of changing a government provided that certain basic requirements are fulfilled. These, according to him, are:

a. As there must have been an abrupt political change, i.e. a coup d'etat or a revolution. It does not matter whether the change has been effected by a military junta or a civilian or group of civilians, subverting the existing legal order with or without the aid of the military. There can be a coup without the use of armed force

b. The change must not have been within the contemplation of an existing constitution. If it were, then the change would be merely evolutionary i.e. constitutional; it would not have been revolutionary.

c. The change must destroy the entire legal order except what is preserved. In order for the coup d'etat to be complete, the new regime need not have abrogated the entire existing constitution. It is sufficient that what remains of it has been permitted by the revolutionary regime; and

d. The new constitution and government must be effective. There must not be a concurrent rival regime or authority functioning within or in respect of the same territory.

It would seem that, in connection with the first requirement, the abrupt change in government must have taken place in a political independent sovereign state[42]. On the last requirement, the issue is not one of legitimacy of the authority assumed by the leaders of

41. T.O Elias: Africa and the Development of International Law, Martinus Nijhoff Publishers 1988, p. 106-117.
42. This is the raison-d'etre of the Madzimbamuto's case 1938 WLR 1129

the coup, but of the efficacy of the new government under the new constitution.

In Nigeria, military regimes did not only attempt to hijack legitimacy from the constitution but tried to assert that decrees are indeed higher than the constitution by claiming supremacy of the decrees over the constitution. This position was supported in the case of Labiyi V. Anretiola[43] where the court held that decrees of the federal military government are superior to the unsuspended sections of the constitution. The court went further to say that it does not matter that those decrees are now called Acts, they are still the enactments of the federal military government and had been enacted to supercede the provisions of the 1979 constitution. The same spirit and position was pronounced by the court in the case of Commissioner of Local Government V. Ezemonkwe[44]. The military regimes and their decrees cannot be legitimate as it used force with legal armtwisting mechanism to subjugate the people to obedience. To placate its face, military regimes usually derive their lifeline from a promise that the civilian legitimate regime will soon

be restored. The restoration of democracy is usually wrapped in a programme that is destined to fail *ab initio* by the very people putting forth the programme.

A legitimate law is one which is made with the peoples' will and acceptance as such law must have taken into account the peoples' custom, history, values and economic development potentials.

43. (1992) 8 NWLR (pt. 258), p. 139.
44. (1991) 3 NWLR (pt. 181), p. 615 at 640

According to Savigny, the German legal philosopher, a legal system of necessity develops in response to the people's national spirit which he called Volkgeist which is a unique, ultimate and often mystical reality and is inseparably linked to the biological trait of a people[45].

Savigny is of the view that law is born with the nation or state, grows and matures with it and automatically dies with the state or nation[46]. Although the current Nigerian constitution of 1999 is still fraught with a lot of incompleteness, incorrect approach or total silence on some vital national issues, it is in the interim, the groundworm of the Nigeria legal corpus. It now depends on Nigerians and its government to agree to have a national discuss in a national conference to address all the issues affecting the well being and socio-economic development of Nigeria. By so doing, the constitution will be blessed with full legitimacy and all the problems militating against the constitution, unity, peace, progress and national development will be permanently solved in Nigeria.

45. Adaramola Basic Jurisprudence, 1992, p. 242
46. Ibid