Everything you need to Know about the Theories of Law

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Although a definition of law has been given previously, it is at best an ad-hoc definition. It can be said that there are as numerous definitions of law as there are lawyers. This section deals with the understanding of law according to the perspectives of different people.

These views are subscribed to by people in a particular school of thought/jurisprudence. These school of thoughts/jurisprudence can also be rightly referred to as the different theories of law.

There are a lot of theories of law but only a few popular ones would be outlined. They are:

1. The positivist school.
2. The pure theory of law
3. Natural Law School
4. Historical school
5. Sociological School
6. Utilitarian School
7. Functional School
8. Realist School

The above-mentioned theories of law would be further expatiated upon below.

The Positivist Theory of Law

This theory of law is spearheaded by John Austin. He proposed the command theory of law which is also regarded to as the positivist school. According to him in his book, The Province of Jurisprudence Determined, he defined law as â€œa command set by a superior being to inferior beings and enforced by sanctions.â€

By this definition, it means that the only things that can be regarded as law are those that are enacted as such by the person authorised to do so. The definition has the following elements:

- The existence of a definite sovereign.
- The sovereign is without legal limitation in the exercise of his power.
- The subjects must be in the habit of obeying him because of his coercive power to impose sanctions.

The positivist theory of law has been criticised on numerous grounds. First, not all laws are couched as commands. For example, the provisions contained in Chapter II of the 1999 Constitution which deals with the fundamental and directive principles of state policy is not binding on the government of the Nation. This is considering the fact that they are not justiciable by the provision of **S.6(6)(c)** of the 1999 Constitution.

Another criticism is the fact that positive law is only concerned with the fact that the sovereign enacts a law. It is not concerned with whether or not the law is moral or acceptable to the society.

Also, the idea of an uncommanded commander who has no legal limitations would not be applicable in todayâ€™s world. Even if it is a military regime, the military is till bound by the provisions of the laws it enacts. For example, in the case of ***Ojukwu vs Governor of Lagos State***, the action of the Military governor in evicting the defendant off his property without following due process was held to be ultra vires and null and void by the court.

Finally, not all human beings obey the law because of the sanctions attached to it. Some people just donâ€™t contravene the law because it is their nature. For example, some people abstain from murder not just because of its punishment but because they find the killing of a fellow human being repulsive.

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The Pure Theory of Law

This theory of law is led by professor Hans Kelson. It is of the view that law is a system of norms accepted by the society to be binding. Each of these norms trace their validity to a higher norm until it gets to the *grundnorm.*The grundnorm is the norm from which other norms get their validity.

For example, murder is unlawful because it can be traced to the provision of **S.315** of the **Criminal Code**. The Criminal Code is valid because it was enacted by the legislature. The legislatureâ€™s powers to make laws is valid because it is provided for under **S.4** of the **1999 Constitution**. The Constitution is also valid because it originates from the people and is accepted by them.

This theory of law has been criticised because it posits that a law is valid if it satisfies the requirement of being backed by a higher norm. It does not concern itself with the morality or immorality of the said law.

Another criticism of this theory is due to the fact that it is not always easy to trace the grundnorm in a given society. The assertion that the Constitution is the grundnorm is one based on false logic. This is due to the fact that it is said that the constitution gets its power from the people. But in the Nigerian situation, we are not sure if it is the people that provided the constitution or the military government.

Also, a grundnorm is only effective as long as it is respected by the people it seeks to govern. If it loses the confidence of the people through an instrumentality of a revolution or a coup dâ€™etat, it would become effective.

A practical example is the fact that the **1999 Constitution** provides in **S.1(2)** that no one can operate the government of Nigeria except in accordance with the provisions of the Constitution. However, when there is a successful coup, this section and a host of others are removed by the military government in power.

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Natural Law Theory

The natural law theory of law is espoused by people like Zeno, Thomas Aquinas and Grotius. They are of the view that law can be deduced by man from reason as to what is right or wrong. This theory of law is of the position that there is an innate tendency in all humans helping to distinguish right from wrong.Â Natural law is simply what is â€œright, just and fairâ€.

Natural law has been the basis for an array of liberation struggles. It was invoked by the Americans in their struggle of liberation from Britain, by the French during their revolution, in the abolition of slave trade and is now being used to justify homosexuality.

However, there are numerous criticisms for this theory of law. First is the fact that unless natural law is promulgated as a law, it does not carry the force of law and would not be enforceable. At best, it would be considered as a moral rule. A very good example is the fact that the **Criminal Code** which operates in Southern Nigeria doesnâ€™t criminalise adultery. However according to **S.387 and 388 of the Penal Code**, which operates in Northern Nigeria, adultery is an offence.

Also, the dictates of natural law are usually seen subjectively. What is fair, equitable and just to one person may not be fair, equitable and just to another person. This issue is what has made natural law to be referred to as an harlot.

A very good example of this is in the clamour for homosexuality. The homosexuals and their supporters are of the view that it is only fair and just for them to be allowed to have sexual intercourse with anyone they choose. Those who oppose it on the other hand are of the opinion that homosexuality is against the order of nature and should thus be prohibited.

Thus, it would be problematic if everyone in the society is left to choose what is right and wrong on the basis of how he feels.

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Historical Theory of Law

This theory was propounded by Friedrich Carl Von Savigny, a German aristocrat. The theory was propounded in order to counter the influence of the natural theory of law in overthrowing monarchs in 17th and 18th century Europe.

The theory is of the view that law should be made in accordance to the custom of the people. This custom, referred to as *volkgeist*, is the spirit of the people and what binds them together. Thus, attempts should not be made to make laws that would deviate from the customs and way of life of the people.

Von Savigny was an aristocrat, thus it is evident that he was interested in maintaining the status quo.

One of the criticisms against this school is the fact that if it is followed dogmatically, it could hinder radical reforms which would turn out to be good for the society. One can only imagine how backward the society would be if strange customs like slavery and absolute monarchy were not abolished.

Another criticism of this theory of law is the fact that it is not at all times that customs are fair and just. There are a lot of customs that segregate a particular class of people. If this theory is to be followed to the latter, it would put these people in perpetual bondage.

This could be seen as the reason for the **Evidence Act** to provide in **S.18(3)** that a custom would only be applicable if it conforms to public policy,Â natural justice, equity and good conscience.

Sociological Theory of Law

The sociological theory gained prominence from the mid nineteenth century to the twentieth century. One of its most prominent supporters was Eugene Ehrlich. According to this school, law is based on what could be called the â€œfacts of lawâ€; how people acted. The way the society acts determines the kinds of laws that would be laid down.

If the society by its actions fails to acknowledge a law, the law is doomed to fail as a means of social control.

A very good example of this is the case of corruption in the Nigerian society. Despite the enactment of many Acts like the **Economic and Financial Crimes Commission Act** and a host of others, corruption is still viewed as a way of life in Nigeria. Virtually everyone has at a point in time given or received a bribe. The different measures put in place to control corruption have obviously failed because the people do not support the law by their actions.

The sociological school however also has its own share of criticisms. First, it is not all the time that conduct influences the law. There are situations in which the law influences the conduct of members of the society. For instance, vehicle

owners register their vehicles because of the law mandating them to do so.

Another criticism is the fact that it is quite risky to â€œgo with the flowâ€. Just because every other person is disobeying the law would not excuse an offender who is caught and Is being made a scape goat. The present Dasuki armsgate scandal is a good example of this. Assuming but not conceding that he is guilty, it would not be a valid excuse that the perpetrators should not be punished because virtually everyone in government at that point was corrupt.

There is another variant of the sociological theory propounded by Roscoe Pound, former Dean of Harvard Law School. According to him, there are limited resources in the society and thus, numerous competing claims to those resources. It is then the aim of the law to balance these competing claims in such a way that it would cause the least harm. This is done through the instrumentality of the courts.

The Utilitarian Theory of Law

This theory of law is championed by Jeremy Bentham. According to him, the purpose of the law is to guarantee communal utility. Utility in this sense means that which affects the happiness of the people. The law should always seek to promote the utility that would positively affect the larger part of the society.

According to this school, there are four basic utilities: security, equality, liberty and abundance. The most important one is security, followed by liberty and the remaining two. The law should always seek to balance individual interest with that of the community.

For example, the law allows for the police to invade the privacy of a suspected armed robber, robbing him of his liberty, in order to guarantee the security of the society.

One of the criticisms against this school is that it doesnâ€™t specify a specific method for balancing the interest of the individual and community.

The Functional Theory

This theory of law is championed by distinguished United States jurist, Oliver Wendell Homes Jr. His view is that the law is what the courts say it is. He says the law should be viewed from the perspective of the bad man. According to him, the bad man doesnâ€™t give two hoots about legal theories, all he cares about is what the court would decide in his situation.

Thus, notwisthstanding what is contained in the statutes, since it is the courts that interprete the law, the law would be what the court pronounces it to be. This school also recognises the power of the court to make law when the statutes do not provide for a particular scenario or they are vague about it.

One of the criticisms against this school is that it only concentrates on the courts and ignores the legislative and administrative authority. This is arguably erroneous considering the fact that the court itself is a creation of statute; **S.6 of the Constitution of the Federal Republic of Nigeria 1999(as amended)**.

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The Realist Theory of Law

This school is of American origin and is subscribed to by people like Oliver Wendell Holmes, Justice Jerome Frank, John Chipman Gray and Karl Llewellyn. This school posits that the law is not just what is in the books and decided cases. They are of the view that the judge and jury, in making their decisions, are influenced by extraneous factors.

For example, if a judge that has been a victim of rape or is close to a victim tries an accused rapist, there is every likelihood that she would not want him to go scot free due to her previous experience. Also, a judge who is handling the trial of a former colleague or contemporary would be lenient compared to the trial of a accused who isnâ€™t related to him.

This school aims at reforming the judicial system. They are of the view that judges should constantly try their best in order to be objective in deciding a particular case.

Which of The Theories of Law is the Best?

The above numerous theories have been explained and it can be said that all the schools are correct in their own right. This is due to the fact that the definitions of law given are affected by the subjective experiences of each of the jurist. A good example is Carl Von Savigny who supports the historical school because he is an aristocrat and thus has an interest in maintaining the status quo.

The main idea behind the different schools can be summarised in one quick allegory of some blind men who were told to identify an elephant by touching it. The one that touched the legs described it as a tree, the one that touched the trunk called it a snake, the one for the body called it a rock and the one that touched the tusk described it as a spear. All the blind men are correct in their own right, however, they were also wrong.

In the light of this, it would be best to quote Professor Mrs Okunniga who stated:

â€ Nobody, including the lawyer has offered, nobody including the lawyer is offering and nobody including the lawyer will ever be able to offer a definition of law to end all definitions.â€

SOURCES

1. Â A.O Sanni, Introduction to Nigerian Legal Method.
2. The Constitution of the Federal Republic of Nigeria 1999 (as amended)
3. The Nigerian Criminal Code Act
4. The Nigerian Penal Code Act
5. The Evidence Act
6. A.O Okunniga, Jurisprudence.