

NATURAL LAW AND THE ATTAINMENT OF JUSTICE IN NIGERIA; AN OVERVIEW.

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ABSTRACT

Human well-being and the flourishing of the individual require a society which will exemplify justice as derived from natural law. Natural law was socio – political theory that impels society to discover the need to realize and appreciate how natural rights objectives and reasons can relate to law. In Nigeria, successive military regime by the promulgations of nefarious Decrees, render the court in the ambits of judicial dispensation powerless, her jurisdiction to adjudicate and make progressive pronouncement in crucial matters concerning natural rights of Nigerians are permanently ousted. However, with the enactment of the 1999 constitution, Section 6(3) therein established the superior court of records. Thus, the authority of the court is derived from the constitution and this enhanced the effective discharge of their duties. Clearly the power of the Nigerian judges is no longer circumscribe in the application of natural law for the attainment of justice. Evidently, the theory of natural law has been seen to have made great impact on the Nigeria Legal System with particular reference to the attainment of abiding justice. This article explore the concept of natural law and it impacts on the attainment of justice by examining thoughts of foremost jurist in Nigeria and beyond, as well as statutory and judicial pronouncement both under the successive military and democratic dispensation in Nigeria.

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INTRODUCTION

The concept of natural law, no doubt, has through the ages been theorised by varying philosophers². It is more or less used to fulfil the peculiar needs of a particular age³. The outstanding feature of natural law theory was the general form it assumed down along the ages, to modern stimuli – the social contract theory. All things considered, the most fascinated and relevant of all the natural law theories of social contract to this article is as expounded by Thomass Hobbes.⁴

Hobbes posited that in the state of nature, everyone enjoys an equal, natural freedom and had the natural right to all things but no corresponding obligations or duties. This freedom instigated the “war of every man against every man”; a life of violence. Every man was law unto himself. The life of man to quote Hobbes famous words was:

*“Solitary, poor, nasty, brutish and short”*⁵

Therefore, man through the exercises of reason (natural right) that peace is desirable and that the sensible thing to do was to enter into a society, thereby limiting his liberty of action provided that other men did the same.⁶ Hence, man surrenders some of his liberty to a sovereign in return for safety and protection of his certain inalienable natural rights.⁷

The above painted scenario, represent the evolution of nationhood or human society and invariably the birth of manmade law (positive law). More jurisprudential ink has been split in

² See Dias R.W.M, ‘*Jurisprudence*’, second edition, (1964), London, Butterworths, pg. 495 – 509.

³ Ibid. at pg. 495.

⁴ Ibid. at 495 – 509.

⁵ Ibid. at pg. 512.

⁶ See Professor Adaramola F, ‘*Basic Jurisprudence*’, Second Edition, (2003) Lexis Nexis, at pg. 26.

⁷ Eze O. ‘*Human Rights in Africa*’ (1988), Lagos: Nigeria Law Publications Ltd; See Cranston M., ‘*What are Human Rights?*’ Chapter I, (1973) New York; Taplinger; See Oputa C. A., ‘*Human Rights in the Legal and Political Culture of Nigeria*’ (1988), Lagos: Nigerian Law Publication Ltd.,

an attempt at discerning the dichotomy and superiority between natural law and positive law.⁸ While it is not the intention of the write up to delve into the wide analysis of the two pivotal concept of law (natural and positive law), it must however be stated, because of its high relevance to this discourse, that natural law today is no longer viewed as a higher law with overriding effect on inconsistent positive law, rather it is viewed as an ideal to which positive law ought to conform without its legal validity being affected. Indeed, natural law method perceives natural law as universal method for the formulation of just law to be borne in mind by lawmakers.⁹

In examining which principles can belong to the category of natural law, the starting-point reference is not looking for rules expressly designated as natural law rules – which would be meaningless as natural law rules cannot be expressly and externally designated – but for rules that have the essence of natural law¹⁰. The natural law element is presumably present in fundamental human rights, in accordance with the stance taken in the 1948 Universal Declaration on Human Rights that the basic rights of an individual are inherent and inalienable.¹¹ Therefore, natural law has undoubtedly exercised the most profound and enduring influence on many aspects of positive law (manmade law) under the Nigerian law.¹² Given Thomas Hobbes' postulation, the notion or concept of society connotes many people living together in a structured setting. Therefore, for people to live together and for the living together to amount to a society there must be laws and norms binding them. The society cannot exist in a vacuum. Law itself provides reasonable expectations, on the basis of which all citizens can trust and respect each other, do business and interact with each other.¹³ To this end, Justice T. Akinola Aguda sounded a warning thus:

⁸ See Sir William Blackstone, '*commentaries on the laws of England*', Vol. 1, Pg. 41. See also Sir Patrick Devlin, the Maccabean lecture; '*the enforcement of moral*' (1959), 45, (Proceedings of British Academy), Pg. 129.

⁹ See generally Ijalaye D.A '*Natural law and the Nigerian Experience*,' (MIJ Publisher limited, Lagos). *Nigerian Essay in Jurisprudence*.

¹⁰ see Orakhelashvili A, '*Natural Law and Customary Law*'. p. 77 Available at: <http://www.zaoerv.de/> Accessed on 15th January, 2014. 10. 00 am.

¹¹ Ibid. Also, for this reason it is safe to adduce natural law as inalienable rights as enjoyed by citizens under the law. Therefore, reference to natural law in this paper is equally reference to natural or human rights.

¹² Ijalaye D.A. Ibid at pg. 3. See also chapter 4 of the 1999 Nigerian constitution which contains provisions of Fundamental human rights.

¹³ Dias op. cit. at 495 – 509.

“All the wrecks on either side of the stream of time, and all the nations that have passed away... all are warning that no nation founded upon injustice can stand.”¹⁴

Law being the cornerstone of any society, the administration of it is crucial to the well being of the society. This is because, the multifunction aspect of law regulate every facet of the life of an individual that make up of a society. Roscoe Pound, a philosopher of the School of thought known as social engineering expounded that *the existence of law is to serve social interest and once it ceases to do this, law becomes sterile.*¹⁵ This theory, as good as it was in the country of its exponent (U.S.A), is equally good anywhere else in the world including a developing and emerging democratic society like Nigeria.

Then, how has natural law impacted on the attainment of justice in Nigeria? In answering this question, this article examines thoughts of foremost jurist in Nigeria and beyond, as well as statutory and judicial pronouncement both under the successive military and democratic dispensations in Nigeria.

NATURAL LAW AND THE ATTAINMENT OF JUSTICE IN NIGERIA.

Until the advent of Nigeria nascent democracy in 1999, Nigerian judges could be said to have been hamstringing in their duty of dispensing justice by the mere fact that they had to operate a rigid constitution and interpret stringent military decrees after taking a judicial oath which does not specifically call upon them to do justice as such but to simply uphold the constitution and the law of Nigeria.

It is peradventure, to observe that the Military ruled Nigeria for up to 30 of her 54 years of independence.¹⁶ The military interruption produced the *Constitution (suspension and modification) Decree of 1966, 1967, 1968, 1978, 1984 and 1994* respectively, which majorly

¹⁴ ‘Crisis of Justice’ at pg. 58. Quoted in D.A Ijalaye. Op.cit at pp. 40- 55.

¹⁵ Dias op. cit at pg. 495 – 502

¹⁶ Nigeria gains her independence in October 1st, 1960 and becomes a republic in 1963. The first military coup occurred on the 15th of January 1966 led by Major Nzojwu Kaduna, wherein the Sarduna of Sokoto Sir Ahmadu Bello (Premier of the Northern region), Alhaji Abubakar Tafawa Balewa (Prime minister of Nigeria), Chief Samuel Ladoke Akintola (Premier of western region) and a host of others were killed.

did not change the content of the 1960, 1963 and 1979 constitution but for the parts suspended (i.e. provisions on fundamental human rights). The military regimes were known and marred by the ouster of court's jurisdiction clauses. Particular references are made to *Section 5, of the constitution (suspension and modification) Decree No. 107 of 1993, and section 1 of the Military Government (supremacy and enforcement of powers) Decree No. 12 of 1994* respectively, which like a swing of hand, equivocally and completely ousted the jurisdictions of courts in matters covered by the Decrees. *The Federal Military Government (Supremacy and Enforcement of Powers) Decree No. 12 of 1994* provides:

“No Civil proceedings shall lie or be instituted in any court for or on account of or in respect of any act, matter or thing done or purported to be done under or pursuant to any Decree or Edict and if such proceedings are instituted before or after the commencement of this Decree, the proceedings shall abate, be discharged and made void.”¹⁷

In essence, the functions of a court called upon to assume jurisdictions in such matters is simply to tell itself that it has no jurisdiction. To do otherwise will amount to usurpations by the courts of the legislative powers granted to the Federal Military and the state Military Governors respectively¹⁸. The only concession given to the court by *Decree No. 1 and 13 both of 1984*¹⁹, is to declare void an edict whose provisions are inconsistent with the provisions of the Decree.²⁰ It is toward the above end, that the then chief Judge of Lagos State, Hon. Justice J.A Adefarasin, (of blessed memory) stated inter alia:

“The ouster provisions bring about a sad situation but it must, to my mind, be interpreted as precluding the ordinary court of the land from questioning the validity of any Decree. After an anxious consideration of all the provision I have already discussed, I have reached the

¹⁷ See also Section 1 (2) (b) (i) of Federal Military Government (Supremacy and Enforcement of Power) Decree No.12 of 1984.

¹⁸ See Constitution (Suspension and Modification) Decree No. 1 of 1984.

¹⁹ Ibid.

²⁰ Ijalaye D.A. Op.cit at pp. 38 – 39.

*decision, reluctant though I am that in particular, by the provision of section 5 of Decree No.1 of 1984, the inherent and expressed power of the court is ousted”.*²¹

In *Okeke v. A-G Anambra State*²², Uwaifo, JCA equally observed as follows:

*“Decree No. 13 of 1984 is an ouster legislation. Once the provisions of a Decree or Constitution ousting the jurisdiction of the courts on any specific matters are clear and unambiguous, the courts are bound to observe and apply them. They are not entitled, even when the ouster has drastic effect on the right of any person, to approach its interpretation by a false or twisted meaning given to it by unacceptable restricted construction.”*²³

The point that could be derived from the foregoing is that the hands of Judges are tied because of the rigid constitutions and stringent Decrees of the successive Military regimes, which they are called upon to apply. Consequently, they have little or no room to manoeuvre for the purpose of administering justice in accordance with natural law.²⁴ Need to observe, however, that close examinations of a certain case decided at this times reveals elements of prism judicial activism on the part of Nigerian courts to guard and guide the natural Law (rights) of her citizens. In *Gani Fawehinmi v. General Sanni Abacha and others*,²⁵ the courts rose up to their constitutional duty of safeguarding the fundamental human rights of the citizens by relaying on the African Charter on Human and People’s Right to hold as illegal the detention of chief Gani Fawehinmi by the Abacha regime.²⁶

²¹ See *Guardian Newspaper Ltd V. Attorney General of the Federation* (unreported) suit No. M/139/84 (High court of Lagos) of 26th of July, 1984. Quoted in Ijalaye D.A, op.cit at pg. 35.

²² (1992) INWLR (pt. 215) 60.

²³ Ibid at p. 86.

²⁴ See Ijalaye D.A. Op.cit at pg. 40.

²⁵ (1996) 9 NWLR (Pt. 475) 710. See also *Lakanmi and Kikelomo Ola V. A.G (Western Region) and others* (1971) 1 U.I.L.R 203.

²⁶ However, the Supreme Court in the instant case later affirmed the superiority of the constitution over domestic treaties. See *General Sanni Abacha and ors. V. Chief Gani Fawehinmi* [2004] 4 S.C.N.J 401. See also the analysis of the case in Oba A.A, ‘The African Charter and ouster clauses under the military Regime in Nigeria; Before and after September 11 Attack’ *African Human Rights Journal* 4 (2), 275, pp. 284- 287.

The advent of Nigeria democracy and the subsequent enactment of the 1999 constitution, particular reference to *Section 6(3)* therein established the superior court of records in Nigeria²⁷. Thus, we can see that the authority of the court is derived from the constitution and this enhanced the effective discharge of their duties. Much the same vein, the legislative powers are provided for in the constitution. *Section 4(8)* provides for the legislative power to be subject to the jurisdiction of courts of law as follows:

“Save as otherwise provided by this constitution, the exercise of legislative power by the national assembly or by the house of assembly shall be subject to the jurisdiction of courts of law and of judicial tribunals established by law, and accordingly the national assembly or house of assembly shall not enact any law that purports to oust the jurisdiction of a court of law or a judicial tribunal established by law”

The implication of the above provisions is that the law enacted by the national assembly or the house of assembly are subject to the judicial searchlight of the courts, unlike under military dispensation as earlier highlighted.²⁸ Thus the court will declare as null and void any act or law as the case may be which provisions are irregularly in contravention or violation of the constitution. In *A.G Ondo State V. A.G Federation*,²⁹ the supreme held that *Section 35 of the Corrupt Practices Act, No. 4 of 2000, was unconstitutional for violating the right to personal liberty guaranteed in Section 35 of the 1999 constitution of Nigeria.*

To this end, under the Nigeria democratic dispensation, the judiciary in order to meet with justice of some cases have had to put off their conservative robe and wore a judicial activist's

²⁷ There are similar provisions of this section in the 1960 and 1979 Federal Constitution of Nigeria.

²⁸ Section 5, of the Constitution (Suspension and Modification) Decree No. 107 of 1993, and section 1 of the Military Government (supremacy and enforcement of powers) Decree No. 12 of 199. See The Federal Military Government (Supremacy and Enforcement of Powers) Decree No. 12 of 1994. See also Section 1 (2) (b) (i) of Federal Military Government (Supremacy and Enforcement of Power) Decree No.12 of 1984.

²⁹ (2002) 9 NWLR (pt. 772) 222 at pg. 310. See *A.G Abia state V. A.G Federation* (2002) 6 NWLR (pt. 763) at pg. 264. See also *A.G Bendel State v. A.G Federation* (1981) 10 S.C 1 – 330, wherein the Supreme Court declared in an unequivocal terms the nullifications of Allocation of Revenue Act 1981, as illegal on the ground that it violated section 55(3) of the 1979 constitution.

regalia which made commentators to readily criticize them as law makers instead of their constitutional role of interpreting the law³⁰. Be that as it may, need to state that the life of

Law will be too short without inculcating in it, element of moderate judicial activism.³¹ Lord Denning M.R, one of the leading crusaders of progressive judicial Activisms, in his attempt at the achievement of justice has this to say:

*“It is no use having just laws if they are administered by bad judges or corrupt lawyers. A country can put up with laws that are harsh and unjust so long as they are administered by just judges who can mitigate their harshness or alleviate their unfairness”*³²

In another breath, Lord Denning³³ opine thus:

*“We do not sit here to pull the language of parliament and ministers to pieces and make nonsense of it. That is an easy thing to do, and it is a thing to which lawyers are prone. We sit here to find out the intention of parliament and ministers and carry it out, and we do this better by filling in the gaps and making sense of the enactment than by opening it up to destructive analysis.”*³⁴

³⁰ See Asein J. O. ‘Introduction to Nigerian legal system’, Sam Bookman Publishers Ibadan. (1998) 67. See Kolajo, A.A. ‘An Introduction to Law’ (spectrum Law series, 2005) p.22. See Elegido ‘Jurisprudence’ (Spectrum Law Publishers, 2007 Reprint) p. 303-4. See Niki Tobi ‘Sources of Nigerian Law’ (M.J. professional publishers, Lagos, 2007 reprint). P.80. See also Oguntade G. ‘Dissenting judgments and judicial law making’: <www.allafrica.com/stories/201002250434.html> assessed on 20th December, 2010. See Bacon F. ‘Of Judicature’ in *Essays* (1625) (Everyman Edition 1979) p 162. See Lord Reid ‘The Judge as law maker’ in *12 Journal of the Society of Public Teacher of Law* (1972).

³¹ See Oputa JSC: ‘Judicial Activism: A catalyst for Political stability’. Guardian Newspaper (Nigeria 16 September, 2003) 7. He stated inter alia: “In a progressive world, the law and the administration of justice cannot afford to be static and retrogressive... we are not to fold our hands and do nothing. No. Our judges have to interpret the law such that it makes sense to our citizens in distress...”

³² Denning A, ‘Road to Justice’, Butterworths London,(1955), at pg. 7.

³³ Lord Denning, ‘Family Story’, Butterworths London, (1983).

³⁴ Ibid at pg. 174.

As if this is not enough, the foremost law lord, again while speaking on the proper role of a judge stated thus:

“My root belief is that the proper role of a judge is to do justice between parties before him. If there is any rule of law which impairs the doing of justice, then it is the province of the judge to do all he legitimately can do to avoid that rule – or even change it – so as to do justice in the instant case before him”

Our own erudite jurist, Hon. Justice Oputa JSC (as he then was) in his paper on the “the citizen and the law” stated as follows:

“It is not readily realized how much the law comes into play and controls the day to day event in the life of the ordinary citizens. It is the law, with the law and by the law that ordinary citizen moves, lives and has his being. In any activity, he meets with the law, or seeks the protection of the law. It is to the law that he looks up for the determination and protection of his fundamental right and essential liberties.”³⁵

It is gratifying to note, that the Nigerian court on numerous occasions have given practical vent to the stand of this progressive jurist in defending natural law (rights) of the citizens, in their avowed readiness for justice. In this write up, to appreciate more of the impact of Natural law to the attainment of justice in Nigeria, few pronouncement of the Nigerian judges in decided cases need be examined;

On the grant of bail in capital offences, Pats – Acholonu JCA, in *Ogueri V. State*³⁶, stated thus:

“It must not easily be forgotten that in a country that prides itself with democratic tents, liberty and law are twin concepts and are therefore inseparable. It is said that bail

³⁵ Quoted in Ijailaye D.A. Op. Cit at pp. 40 – 50.

³⁶ (2002) 2 C.L.R.N at pg. 24, Para. A – B.

for anyone accused of murder is impossible. We must avoid being intellectually captured by the shrine of formalism. We should not therefore follow false gods who are satisfied with primitive oblations, rites and ceremonies. It is our duty as guardians of justice to rise when occasions call for it and allow the goddess of justice to rule our heads and actions. In that case the authority of law would have been preserved and law will be used as an instrument of abiding Justice.”

Further on bail issue, the Supreme Court have had time to decide on priority of National Security over right to personal liberty as enshrined in Section 35 of the 1999 Constitution. The Supreme Court in the case of *Alhaji Mujahid Dokubo Asari V. Federal Republic of Nigeria*³⁷ made a notable pronouncement on such issue. Per Muhammad, JSC. Held:

“let me observe from outset, that although the Respondent did not advert its mind to fully address the Appellant’s issue, I must draw the attention of the learned counsel for the Appellant that the main discuss of his submission on issue two is on state of emergency, I think this is an unnecessary voyage in world of fantasy. What is the relationship between grant of ball or refusal thereof with the suspension of a part of the Constitution i.e Section 35 of that Constitution? What brought about the provisions of the Constitution which result to the declaration of emergency? If refusal of bail to any person accused to have committed a crime will amount to jettisoning some part of the Constitution, or will invoke the declaration for a period of emergency, then this Country, which I believe is populated by majority of law abiding citizens, who always carry out their normal day to day life without instilling any fear or causing any havoc to any one, at any time will be doomed. The reference made by Learned Counsel to provisions on emergency situations is nothing other than concoction of mere facts to whip-up sympathy. The Learned Counsel is aware that Courts do not make Laws.

³⁷ (2007) 12 NWLR Part 1048. 320.

They interpret law. Court cannot suspend the Constitution or any part thereof. However if in its role of interpretation, a Court makes a pronouncement which may have the weight and effect of declaring a Law or some part of the Constitution for that matter null and void, the Court must find support from the same Constitution or any other statute of equal force. The pronouncement by Court below is that where National Security is threatened or there is real likelihood of its being threatened Human Rights or the individual right of those responsible takes second place. Human Rights or individual rights must be suspended until the National Security can be protected or well taken care of.... This is not anything new. The corporate existence of Nigeria as a united, harmonious individual and indissoluble sovereign nation is certainly greater than any citizen's liberty or right. Once the security of this nation is in jeopardy and It survives in pieces rather than in peace, the individual's liberty or right may not even exist".³⁸

The above decision of the court shows the extent to which the court could in the words of Pats – Acholonu JCA, in Ogueri's case (supra) *avoid being intellectually captured by the shrine of formalism and allow the goddess of justice to rule its heads and actions. So as to preserved the authority of law and used law as an instrument of abiding Justice in the interpretation of Section 35 of the 1999 constitution of Nigeria.*

Further, the machinations of the politicians and the brazen mischief of the leaders of political parties aroused the activist ire in our Supreme Court in *Ugwu v. Ararume*³⁹, the Supreme Court confronted the arbitrary nomination and dumping of candidates by political parties in the instant case. For the first time, it was thought that a member of a political party who had fought for and won the right to represent his party at a general election is entitled to the protection of his mandate against the whimsical preferences of a "strong man" or "the

³⁸ Ibid at Pg. 335.

³⁹ (2007) 12 NWLR (Pt. 1048) 367.

movers and shakers” within the party. The Supreme Court moved to protect that right. Justifying the paradigm shift by the Supreme Court Niki Tobi, JSC, said as follows:

*“Let me read Article 2 of the Constitution of the Peoples Democratic Party, the 3rd Respondent, to make a point that has occurred to me: Subject to the provisions of the Constitution of the Federal republic of Nigeria, this Constitution shall be supreme and its provisions shall have binding force on all members and organs of the party. By Article 2, the supremacy of the 3rd Respondent is subject to the supremacy of the Constitution. This is consistent with the provisions of section 1 of the Constitution of the Federal Republic of Nigeria, 1999. Right of access to Court is a constitutional right which is guaranteed in the Constitution and no law, including that of a political party, can subtract from or derogate from it or deny any person of it. Such law will be declared a nullity by virtue of the section 1 (3) of the Constitution. Fortunately, Article 2 of the Constitution of 3rd Respondent is not one of such laws. On the contrary, it vindicates and fortifies section 1 (2) of the Constitution and that is good, very good indeed. The 3rd Respondent knows clearly the constitutional position”.*⁴⁰

The cases cited above, clearly indicate that the power of the Nigerian judges is no longer circumscribe in the application of natural law (right) for the attainment of justice. This greatly been supported by the 1999 Nigeria Constitution. In definitive like terms, the modifications as seen in the enactments of the various new High court civil procedures rules gives credence to the application of substantial justice. Order 2, Rule 2 of the Kwara State High Court Civil Procedure Rules 2003 state thus:

“Where a matter arises in respect of which no provisions are made in the rules, the court shall adopt such

⁴⁰ Ibid at pg. 450, Para. H.

procedure as will in its view do substantial justice between parties concerned.”

Order 56 (1), of the same rules of court equally gives the court a wide range of latitude at achieving substantial justice. It provides as follows:

“Subject to particular rules the court may in all cases make any order which it considers necessary for doing justice, whether the order has been expressly asked for by the person entitled to the benefit of the order or not.”⁴¹

CONCLUSION

There is no denying the fact that the objective of natural law is to identify the conditions and principles of practical mindedness of good and proper order in the society. It is the postulation of positive hope for the survival and continuous advancements of human race. Perceiving natural law as universal method for the formulation of just law to be borne in mind by lawmakers, has indeed dramatically, under democratic dispensation, impacted on the attainment of justice in Nigeria. The conservatives robes hitherto wore by the judges or better still imposed on them under the military regime by the promulgations of nefarious Decrees, which renders the court in the ambits of judicial dispensation powerless and her jurisdiction to adjudicate and make progressive pronouncement in crucial matters that were permanently ousted evaporated into thin air. The constitution, law enacted by the legislative arms and as epitomised in decided cases, permits the courts to be flexible in its approach at administering abiding justice. Thus judges have greater latitude in bending the law and sometimes changing the law in a bold attempt to administer discretionary justice derivable from individual's natural right (law). They do this notwithstanding the existence of the well – thumbed axiom that the function of the judge is '*Jus dicere*' (to interpret the law) and not '*jus dare*' (to make the law). Lord Denning M.R, one of the foremost Law lords, in *the Discipline of law* said:

⁴¹ Similar provisions exist in various State High Court Civil Procedure Rules in Nigeria.

“If we never do anything which has not been done before, we shall never get anywhere. The law will stand still whilst the rest of the world goes on and that will be bad for both.”⁴²

⁴² See also Lord Denning dictum in *Packer v packer* (1954) AC at 22. No doubt the Law Lord quoted himself in Packer’s case in his book the discipline of law.