WHAT'S WRONG WITH THE LAW ?

By:

Professor M. I. Jegede

Nigerian Institute of Advanced Legal Studies

What's Wrong with the Law?

N.I.A.L.S. Annual Lecture Series 12

What's Wrong with the Law?

By

Prof. M. I. Jegede

Nigerian Institute of Advanced Legal Studies, Lagos
1993

First Published 1993,
Reprinted 2007,
By
Nigerian Institute of Advanced Legal Studies,
P.M.B. 12820,
University of Lagos Campus,
Lagos,
Nigeria

ISBN 978-2353-36-1

Printed by NIALS Press, Abuja

Foreword

Anniversary Lectures have become a feature of the Institute's yearly activities and in our invitations, it is customary for us to alternate the Lectures between home grown and foreign scholars and this we do every other year. Past anniversary lectures have been given by eminent jurists from within and without on the basis of this roster of alternative years. Some on the honoured roll have been Professor Sir Roy Marshall, Professor Frowein of the University of Heidleberg and Hon. Justice A.G. Karibi-Whyte, our current Chairman of Council. The 10th anniversary lecture in 1989 was given by a home grown scholar in the person of Professor B. O. Nwabueze, a National Merit Award winner and a Fellow of the Institute. His topic then was "Social Security in Nigeria." The next lecture to be given by a scholar from within was that of 1991, by Professor Itse Sagay, but he selected a topic in International law. Since 1989, a number of changes have taken place within Nigeria's body politic begging for recognition and for appropriate laws to meet the changes. And so, there are lacunae, here and there, and many inadequacies.

This year's topic, **What's Wrong with the Law?** could not, therefore, have come at a more appropriate time.

The Lecturer for this year, Professor M. I. Jegede, apart from the Late Judge T. O. Elias, is one Professor who has had the longest association with the Institute of all the past and present Professors of Law in the country. We invited him because we sincerely believe that he will have a message for his audience at a time when law in many of its facets is yawning for reform.

Law is not a static phenomenon; it is constantly changing with changes in attitudes and behaviour of the people over which it operates, as such law requires continuous examination. In the case of Nigeria this is necessary in order to remove the ambiguities which have bedeviled it at the statute and case law levels since independence.

The author has, therefore, in the lecture, which he has written in a most scholarly manner and delivered with characteristic candour, touched on some of the incongruities and shortcomings in our laws.

In his introduction, he attempted a definition of law and thereafter stressed the function of law in society. He highlighted the deficiencies in Nigeria's land law, the adverse effect on society of delays in the administration of justice, occasional adherence to technicalities of the law by our judges and the consequences of such adherence. He then pointed the dangers of enslavement to doctrines which are antithetic to our congenital cultural and traditions.

Professor Jegede has done everything possible in the lecture to bring into focus **What's Wrong with the Law?** and this he has done admirably well.

There is no doubt that the lecture has attained the high standard which the Institute has set for its anniversary lectures and will certainly find a place in the libraries of practitioners and all else who are interested in law reform. I commend it to all.

M. A. Ajomo
Director-General

Lagos
April, 1993

WHAT'S WRONG WITH THE LAW?

*I*ntroduction

Let me begin by expressing my great pleasure at being in this great and historic auditorium today to deliver the 1993 Anniversary Lecture of the Nigerian Institute of Advanced Legal Studies. I consider it a unique privilege. It has to be, because, the privilege to give this Lecture is extended to only one person within a period of twelve months. I am particularly grateful to the Director-General and members of his staff for the great honour done me by inviting me to deliver this Lecture, thereby assuring me of a place in the annals of this great Institution – The Nigerian Institute of Advanced Legal Studies. My association with the Institute dates back to 1964. For about fifteen years thereafter, I was privileged to serve in different capacities in the process of ensuring a programmed and orderly growth of the Institute. My direct involvement as the *de factor* Director of the Institute terminated in 1977 when the first Director properly so-called, now Director-General, was appointed.

Since 1977 I have, in some other capacities, been associated with the Institute to wit: as a permanent and faithful user of its library and lately as a member of its Governing Council. All along, I have always been conscious of the objective which the founding fathers of the Institute intended it to achieve: a continuous examination of our laws and legal institutions with a view to ensuring their orderly growth and development. It is this consciousness that informed the choice of the topic for this Lecture which is **What's Wrong with the Law?** I believe I will in the course of the Lecture highlight some points and perhaps provoke further discussions on some general issues affecting administration of justice. Law is the focus of the topic of this lecture. If the word 'law' is removed from the topic, what remains would, at best, be a bundle of ambiguities. Since the word means so much to the topic, it is meet and proper to briefly expatiate on the kind of law that constitutes this focus.

The Meaning of Law

Lawyers, from time immemorial, have been and are still of the firm view that there is no universally acceptable definition of law. "Obviously, 'law' can never be defined" so said Thurman Arnold in *The Symbols of Government*.[1] This conclusion is no doubt premised on the fact that previous attempts and endeavours to provide a general definition of law acceptable for all purposes have proved unsuccessful.

The difficulty emanates from the fact that law is science of jurisprudence and jurisprudence, reduced to its elements, is a lawyer's thought about the law. This presupposes that every lawyer has his own jurisprudence. Not long ago, a former British Lord Chancellor said:

> we who have taken judicial oath cannot choose what laws we enforce or what acts we allow to go unpunished, by reference to our private standards and values.[2]

On similar issue Justice McReynolds, of the United States said:

> a judex is not an amorphous dummy unspotted by human emotions. Neither is he a monk or a scientist but a participant in the living stream of our natural life, steering the law between the dangers of rigidity on the one hand and formlessness on the other.[3]

And yet another common law judge, said:

> The object of the common law is to solve difficulties and adjust relations in social and commercial life. It must meet, so far as it can, sets of facts abnormal as well as

1. *The Symbols of Government* (1935) p. 36.
2. Hailsham L.C: Guidance for Magistrates on Sensational Cases; *Financial Times*, October 14, 1984.
3. See Eso: *Thoughts on Law and Jurisprudence*, (1990) p. 141.

usual. It must face and deal with changing or novel circumstances, unless it can do that it fails in its function and declines in its dignity and value. An expanding society demands an expanding law.[4]

These are three great minds pronouncing the same issue but from different perspectives and points of view, each evidently influenced by his own jurisprudence or conception of law as regards the role of a judge. Perhaps this explains the genesis of the difficulty of lawyers in their varying efforts to procure a universally acceptable definition of law.

An analytical jurist would see law from the point of view of the imperative theory, which defines law as a general command of a sovereign addressed to his subjects. This theory was conceived by John Austin against the background of the political setting of his country, England. Indeed, he strove not without success, to make the English political system fit the theoretical structure which he postulated.[5] Kelsen further purified the imperative theory by rejecting the concept of sovereignty which is the corner-stone of Austin's analytical approach. It is not in doubt that Hans Kelsen was engaging in sociology when he wrote his *Pure Theory*, notwithstanding his indignant denials, because he was asserting, that in any society where law exists, it must have the formal structure which he sets out and no other. The sociologist is interested in such formal structure.[6] The imperative theory required the courage of Hart in his *Concept of Law* to add flesh, in terms of social and political factors, to the arid definition of law emanating from the imperative theory of law. In his preface he wrote "notwithstanding its concern with analysis, the book may also be regarded as an essay in descriptive sociology."[7]

---

4. *McCardie J. Prager v. Blastpiel, Stamp and Heacock Ltd.* (1924) 1 K.B. 566 at 570; (1924) All E.R. Rep. 525 at 527
5. *Geoffrey Sawer: Law in Society* (O.U.P.) p. 1.
6. *Ibid* at p. 5.
7. See Preface: *The Concept of Law* (O.U.P.) 1961.

There is the sociological jurist whose emphasis is on the function of law in society; he sees law as an instrument of social engineering, for reconciling and resolving conflicting claims and interests with the satisfaction of maximum of wants with the minim friction and waste. By sociological jurisprudence is meant the speculations of those jurists who have paid detailed attention to the structure, working, and purposes of legal systems from a position, so to speak, 'within the law,' but have emphasised the social relations of law rather than its metaphysics or its formal logic.[8] Closely akin to sociological jurist, though narrower in his own conception of law, is the American Realist who sees law, in the words of Holmes, the chief exponent of the School, "as the prophecies of what the courts will do in fact, and nothing more pretentious are what I mean by the law."[9]

There is the historical school, whose adherents see law in its evolutionary character in that law grows with and represents the consciousness of the people. In the words of Savigny:

> Law grow with growth, and strengthens with the strength of the people and finally dies away as the nation loses its nationality.[10]

Then the Marxist Theory of Law or the economic approach: The proponents of this theory see law as an instrument of oppression employed by the capitalist class of the society to exploit the commoners. The theory predicts that the inevitable clash between the two classes will bring about the withering away of the state and law.[11] Yet the categories of varying schools of jurisprudence are not closed. It is therefore not difficult to

---

8. Geoffrey Sawer *op.cit.* at 16.
9. The Path of Law (1897) 10 *Harv. L. Rev.* 457-478; Collected Papers, 172-173.
10. Of the Vocation of our Age for Legislation and Jurisprudence (1831) (transl. Haywood) p. 27.
11. See Lloyd: *Introduction to Jurisprudence* (4th ed.) p. 734.

understand why it is obvious that law can never be defined. "However, with equal obviousness, it should be said that the adherents of the legal institution must never give up the struggle to define law, because it is an essential part of the ideal that it is rational and capable of definition."[12] Further, as Lloyd rightly observed, in practical life, clarity is often attained, and futile dispute avoided by a careful defining of our terms. Equally, the scientist knows that little advance would be possible without a rigorously defined terminology. Admittedly, such precision may not always be attainable, but an attempt at an approximation is not necessarily futile.[13] For this reason and for the fact that the topic of this lecture can hardly be appreciated if an attempt, however imperfect, is not made to analyse or describe what law is about with particular reference to the topic.

In the context of our legal system, structure and predicated on the rule of law, and with a blind eye on military administration which in itself is incapable of accommodating any known definition of law, law is a body of rules binding on members of the society either as individuals or as a group, and is enforceable directly or indirectly, by institutions created for that purpose within the society. Thus:

> The three most general and important features of the law are that it is normative, institutionalised, and coercive. It is normative in that it serves, and is meant to serve, as a guide for human behaviour. It is institutionalised in that its application and modification are to a large extent performed or regulated by institutions. And it is coercive in that obedience to it, and its application, are internally guaranteed, ultimately by the use of force.[14]

---

12. Thurman Arnold: *The Symbols of Government*, p. 36.
13. *Introduction to Jurisprudence* (4th ed.) p. 47.
14. Joseph Raz: *The Concept of a Legal System* (O.U.P.) 1970 p. 3.

Whatever definition or description is ascribed to law, it is now beyond doubt that law is by nature, complex and technical. Though, the concept of law is pervasive, its existence is recognised everywhere in organised societies; its intricacies and functional effects are largely the concerns of members of the legal profession.

The Relevance of Law

The importance of law is such that it is difficult or impossible for a society to exist without law. As Freeman wrote:

> Fiction provides us with numerous examples of utopian societies where congruence of norm and ideal is such that there is perfect social harmony and no need for law or lawyers to emerge. History teaches us the unhappy truth that no such society has ever existed. In all societies, socialisation is an unequal process, there is always deviance and conflict, and law can be seen to emerge as a norm-asserting authority with the coercive power to sanction those guilty of violating the norm. It is difficult to escape the fact that law is necessary. If a society should ever come about where it is not, it may be predicted with certainty that it will be a society different from anything we have known.[15]

A society consists of individuals who as of necessity have to interact for the purpose of achieving individual aspiration within the society as well as the society's commonly shared values and aspirations. As a learned Judge once said:

> the consequence of such interaction also means and implies the emergence and existence of rights and benefits; as well as duties and obligations. Thus very early

15. *The Legal Structure* (Longman) 1974 p. 1.

in life, man becomes aware that he is living in a world of laws. He becomes aware that to live in any society, he has to abide by the laws of that society – laws that regulate and govern the various relationships demanded by society. These relationships may be familiar, social or else inter-societal. He also discovers that obedience to these law is essential for the harmonious existence of the society as a whole and for the preservation of the individual. He can act as though the laws do not exist since he has free will – but he soon discovers that obedience to the laws of his society offers him the greatest chances not only of happiness but also even of survival. The fish, for example, lives in water in obedience to aquatic laws. If it leaps out of water unto the bank, in search of greater freedom, it will die; and so will man.[16]

So it seems that the prediction of Marx and his disciples of an on-coming classless society devoid of law may after all prove unattainable. This view is not only consistent with historical facts but also with available empirical evidence. Life in a lawless society must indeed be tyrannical, nasty, brutish and short. A society which lacks a minimal code would certainly be a suicide club.[17]

With that much importance attached to law in society, and since our society is predicted on law, it is meet and proper to ask and discuss the question **What's Wrong with the Law?** it is a viable way of ascertaining the continuous relevance of law to the individual as well as the commonly shared aspirations of members of our society. For it is now well established that no legal system could long survive if it fails to maintain a viable relationship with the society it serves.

---

16. Oputa, JSC: The Independence of the Judiciary in a Democratic Society- Its Needs, Its Positive and Negative Aspects.
17. H.L.A. Hart: *The Concept of Law* (1961) pp. 189-195.