THE APPLICATION OF NATURAL LAW AND POSITIVE LAW TO THE NIGERIAN LEGAL SYSTEM

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Abstract

Natural law means the law of reason. It means what is "fair", "just", or "right". The philosophers of ancient Greek where the idea of natural law originated considered that that there was a kind of perfect justice given to man by nature which is discoverable through rational use of reason, and that human law (positive law) should conform with this as closely as possible. On the other hand, positive law is the term generally used to describe human legislations or man-made laws. Positive law theory, otherwise referred to as legal positivism emphasizes a firm distinction between "what the law is" (positive law) and "what the law ought to be" (natural law). The research is an inquiry into the application of natural and positive law to the Nigerian legal system. In the course of this inquiry, it is the researcher's finding that, in the Nigerian legal system, there is a firm separation of 'what the law is', from 'what law ought to be', that is to say, a firm separation of positive law from natural law. The researcher concludes that a harmonious application of natural law and positive law, would ensure the existence of a better, balanced and secured legal system, and to a large extent, forestall the enactment or enforcement of laws which are largely immoral, grossly unjust or inherently unreasonable. It is therefore the researcher's recommendation that the Constitution of Nigeria should be amended to expressly provide for a critical reciprocity in the application of natural law and positive law in the Nigerian legal system. The strict spirit of legal positivism should be constitutionally relaxed in the Nigerian legal system and the blood of natural law should be constitutionally allowed to run in the vein of the Nigerian legal system.

Keywords: Natural Law, Positive Law, Nigeria, Legal System, Reciprocity, Constitution.

1.0 The Idea of a Legal System

The pivotal words here are 'legal' and 'system'. The word 'legal' means deriving authority or founded on law; of or relating to law, and a system has been defined variously as a regularly interacting or interdependent group of items forming a unified whole; a group of devices or artificial objects or an organization forming a network especially for distributing something or serving a common purpose.[1] Explaining the word 'system', it has been submitted elsewhere that:

> A system connotes an ordered set of ideas, theories or principles interacting within a given framework; or the organized relationship between the component parts of a body. Just as we have the nervous system or the digestive system in man, we also speak of a legal system comprising a legal order of normative rules.[2]

Regarding the word 'law'; something has already been said about it. From the foregoing, a legal system may be defined as an ordered set of laws sharing special but common attributes. It refers

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[1] Webster New Collegiate Dictionary, cited CE Ibe, 'Nature of Law and Legal System in Nigeria' in GC Nwakoby *et al* , eds, *Fundamentals of the Nigerian Legal System* (Royapuram: Bekaam Printers PVT Ltd., 2011) p.6.

[2] CO Okonkwo (ed), *Introduction to Nigerian Law* (London: Sweet & Maxwell, 1980) p.40.

to the totality of laws, conventions, practices, procedures, and institutions or machinery which are in *esse* for the administration of justice, and maintenance of peace and order in any given society, state or community.

It has been submitted that 'for there to be a viable legal system within a defined area, there must be in place, certain ultimate principles from which all others are derived but which themselves are self-existent.'[3] The ultimate principle(s) constitutes the *fons et origo* (supreme law or grundnorm) of the legal system to which every other rule or principle or law must conform for validity. Any law, rule or principle that is inconsistent with the tone and tenor of the *fons et origo* (the ultimate law) should to the extent of that inconsistent be void. For example, the *fons et origo* in the Nigerian legal system can be ascribed to be the Constitution of the Federal Republic of Nigeria, 1999 although the Constitution derives authority and legitimacy from the people of Nigeria. That is the supreme law in Nigerian and all other laws, principles or rules derive validity therefrom; in effect therefore, any law, rule or principle that is inconsistent with the Constitution shall to the extent of such inconsistency to be void.[4] To buttress the supremacy of the extant Nigerian Constitution as the *fons et origo* of the Nigerian legal system, the researcher would at this juncture, allow a decision of the Supreme Court of Nigeria to talk, to wit:

> It is by it (the Constitution) that the validity of any law, rule or enactment for the government of any part of the country will always be tested. It follows therefore, that all powers; be it the legislative, executive and judicial, must be traced or predicated on the Constitution for the determination of their validity. All these three powers that I have mentioned must and indeed, cannot be exercised inconsistently with any provisions of the Constitution. Where any of them is so exercised, it is invalid to the extent of such inconsistency. Furthermore, where the Constitution was enacted exhaustively on any situation, subject or conduct, anybody or authority that claims to legislate, in addition to what the Constitution had enacted must demonstrate, in clear and unambiguous terms, that it has derived the legislative authority from the Constitution to so do. I go further to say that where the Constitution has set out certain conditionalities for doing a thing, no legislation of the National Assembly (in the absence of clear amendment of the particular provision of the Constitution so stipulating the afore-mentioned conditionalities) or of a State House of Assembly can alter those conditionalities in any way, directly or indirectly, unless the Constitution itself, as an attribute of its supremacy, so expressly authorized, such is the eminent position of the power and authority which the Constitution enjoys. The Constitution is very much supreme to all other laws of the land and its provisions have binding force on all authorities and persons throughout the Federal Republic of Nigeria.[5]

A set of legal norm is therefore, said to constitute a system when they form a (more or less) cohesive whole, which is, to an extent, in conformity with its application, and further, there are relations between these norms such that some of them are superior in rank to others or that some

[3] A Ojo, *Constitutional Law and Military Rule in Nigeria* (Ibadan: Evans, 1987) p.82.
[4] The Constitution of the Federal Republic of Nigeria 1999; s. 1 (3).
[5] Per Aderemi, JSC in *Tanko v The State* (2009) LPELR-SC.53/2008. Also reported in [2009] 4 NWLR (Pt. 1131) 430.

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derive their validity from others. For example, natural law claims to be superior in rank to all human (positive) laws and hence, human laws must derive validity from it (natural law). This is the idea behind the study of legal systems.

In view of the idea of a legal system as set out above, it is hereby submitted that the Nigerian Legal System consists of the totality of the laws or legal rules and the legal machinery which obtain within Nigeria as a sovereign and independent African country.[6] The goal which the Nigerian system seeks to achieve is the administration of justice together with the maintenance of peace and order including good government in Nigeria. The first constituent of a legal system is the totality of the extant applicable laws therein. This paper is concerned with the application of natural law and positive law to the Nigerian legal system.

2.0 Meaning, Origin and Development of Natural Law

The term 'natural law' is used in two senses; that is, the descriptive and prescriptive senses. Natural law in the descriptive or scientific sense is simply a formulation of the regularity with which certain things happen uniformly all over the world, all things being equal. All the laws such as the law of plenary motion, the law of gravitation, the law of osmosis, the law of relativity which describe the regularity and uniformity with which things happen under certain conditions in the world constitute natural law in the descriptive sense of the term. On the other hand, in its prescriptive sense, natural law is a universal precept or command intended by nature to regulate human behavior.[7] In this research paper, natural law is discussed in the prescriptive sense. In this sense, the Black's Dictionary[8] defines natural law as:

> A philosophical system of legal and moral principles purportedly deriving from a universalized conception of human nature or divine justice rather than from legislative or judicial action; moral law embodied in principles of right and wrong <many ethical teachings are based on natural law>. – Also termed law of nature; natural justice; *lex aeterna*; eternal law; *lex naturalae*; divine law; *jus divinum*; *jus natural*; *jus naturae*; (in sense 2) normative jurisprudence*; jure naturae*.

Accordingly, natural law means what is 'fair', 'just' or 'right'.[9] It has also been defined as the law of reason, rightness and truth.[10] It is the law 'enacted' by nature or God and which is discoverable by reason. Hence, natural law, unlike positive law, is not made by man; it is only discoverable by him.[11] One of the provisions of natural law is that of supremacy clause whereby natural law brands itself with the stamp of supremacy over man-made (positive) law and, in effect, any deviation of positive law from the dictates of natural law becomes a corruption or perversion of law and thus, such positive law (which is inconsistent with natural law) must, to the extent of such inconsistency, be invalid. As a prominent proponent of natural law, Cicero, puts it:

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[6] CO Okonkwo (ed), *op. cit.*

[7] JI Omoregbe, *Philosophy of Law: An Introduction to Philosophical Jurisprudence* (Lagos: Joja Educational Research and Publishers, 1997) pp. x – xi.

[8] BA Garner, *Black's Law Dictionary* (9th edn, Minnesota: West, 2009) p. 1127.

[9] JO Assein, *Introduction to Nigerian Legal System* (2nd edn, Lagos: Ababa Press, 2005) p.2.

[10] AA Owoade, 'Rule of Law & Justice System in Nigeria: The Common Law & Islamic Jurisprudential Approach' (2009) 2 *CJJIL*, 41.

[11] < https://www.legalservicesindia.com/article/519/Natural-Law.html> accessed on 04 February 2023.

> True law is right reason in agreement with nature. It is of universal application, unchanging and everlasting. It summons to duty by its command, and if it is from wrongdoing, by its prohibition…it is impossible to abolish it entirely. We cannot be free from its application 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 external and unchanging law will be valid for all nations and for all times. And there will be one master and one ruler – i.e. God, author of all authority. He is the author of all laws which is promulgated and which is judged.'[12]

The origin of natural law postulations is not completely free from controversies. What is however clear and in respect of which jurists and philosophers have been unanimous is that, natural law was conceived and developed in the Greek City – States.[13] The philosophers of ancient Greek where the idea of natural law originated considered in the main, that there was a kind of perfect justice given to man by nature and that human law (positive law) should conform to this as closely as possible. In other words, the universe was governed by immutable and intelligible laws which are discoverable by reason. Regarding the phrase 'discoverable by reason', Brierly's view is imperative. According to him:

> It is true that when medieval writers spoke of natural law as being discoverable by reason, they meant that the best human reasoning can discover it, and not of course, the result to which any and every individual's reasoning led him was natural law…[14]

For over two thousand years, the idea of natural law has played a prominent part in thought and history. It has been all along been considered as the ultimate measure of right and wrong. In recent times, there has been an upsurge of legal and political activism, which can be traced (directly or indirectly) to the influence of natural law. It has been submitted elsewhere that: 'The concept of natural law is one of the most confused ideas in the history of western thought'.[15] This is perhaps due to the fact that there are various conceptions of natural law over the years, and because even those who are in basic agreement on natural law theory often cannot see eye to eye on the particulars thereof. In reaction to unjust, unreasonable, immoral or bad laws, men cited and relied on natural law as a superior law to force such unjust, unreasonable, immoral or bad law(s) to submit to the relevant dictation(s) of natural law. In other words, natural law plays an indispensable role in the struggle of man in search of justice; for instance, the record of wars, clamour for independence (secession) and revolutions, of which Nigeria has its own share could be justified by the notion of natural law, as being a reasonable struggle of man in a bid to discover and secure justice. It has been submitted elsewhere that:

> 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 human behaviour which is natural, that is to say which corresponds

[12] Quoted in ON Ogbu, *Modern Nigerian Legal System* (2nd edn, Enugu: CIDJAP Press, 2007) pp. 12 – 13.
[13] I Akomolede, *Introduction to Jurisprudence and Legal Theory* (Lagos: Niyak Print and Law Publication, 2008) p.22.
[14] JL Brierly, *The Law of Nations*, quoted in BA Garner, *op. cit*.
[15] JW Whitehead, *The Second American Revolution* (Westchester: Crossway Books, 1982) p.181.

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> to nature because it is required by nature, and human behaviour which is unnatural, hence contrary to nature and forbidden by nature. This assumption implies that it is possible to deduce from nature, that is to say from the nature of man, from the nature of society and even from the nature of things, certain rules which provide an altogether adequate prescription for human behaviour, that by a careful examination of the facts of nature, we can find the just solution of our social problems. Nature is conceived as a legislator, the supreme legislator.[16]

Natural law has a long and illustrious history. In all its epochs; it has been subjected to the most virulent attacks and as a consequence, it has been common practice to describe its conditions as terminal. Nevertheless, it has the habit of bouncing back, leading to the inevitable conclusion that it represents one of the most durable motifs in the development or moral and political theories.

It would be far beyond the scope of this essay to inquire into the history of natural law in detail. Instead, the researcher focuses on the meaning, origin and the central thesis or postulations of natural law, and its application to the Nigeria legal system, comparing it with the application of positive to the Nigerian Legal System. Although natural law has, over the past 2,000 years or thereabout, manifested itself in various guises, it is possible to deduce the central theme prevalent in most theories of natural law. The central theme is that there exist in nature (human nature in particular), a 'rational order'. This rational order supplies value-statements independent of human will which are usually believed to be universal and eternal. These value-statements are expressed in the form of moral imperatives providing an objective tool with which the legal and political structures can be (critically) evaluated.

Notwithstanding the variety in approach to (or perception of) natural law theory over the years, there exist certain agreement among natural law thinkers and jurists, such that it is possible to set out a general over-view of natural law postulations and to identity its central thesis or claims. The postulates of natural law are as follows: 17

i. That man is gifted with intelligence, with which he conducts his activities. Thus, he is capable of determining for himself, the end which he pursues.
ii. That man has the mandate to obey the ordination of the duly constituted authority that the unwritten natural law represents.
iii. That human conduct is controlled or dictated by the nature of man under the control of reason and is certainly independent of any form of intervention including legislation.
iv. That natural law is an aggregate of natural rights and obligations which are inevitable concomitants of the human nature.
v. That it is the responsibility of the state (government) through its positive law to acknowledge the existence and immutability of natural law and to ensure that all positive laws conform to natural laws.
vi. That natural law is binding because it is willed by God.
vii. That natural law is the foundation of any moral judgment and hence the foundation of any just society.

[16] H Davies & D Holdcroft, *Jurisprudence: Texts and Commentaries* (London: Butterworths, 1991) pp.149-150.
[17] I Akomolede, *op. cit*, pp. 25 – 26.

viii. That natural law has the objective moral principles, which are dependent upon nature of the universe and which is discoverable by reason.
ix. That natural law cannot be faulted because it is divinely inspired and universally applicable.

From the foregoing and for the purposes of this essay, it is possible to distil or extract the basic postulations of natural law as follows:

1. Natural law is universal, immutable and everlasting.
2. That which is good, just, reasonable or moral is in accordance with nature (natural law), but that which is bad, unjust, unreasonable or immoral is contrary to natural law. Therefore, it follows that natural law is good and indispensable.
3. There exist in nature, a rational order and which can be discovered by man through reason.
4. Natural law emphasizes the moral aspect of law. It sets out *lex ferenda* (law as it ought to be) as distinct from or opposed to *lex lata* (law as it is).
5. There are absolute values, and ideas emerging from natural law, which serve as the validity of laws. A law that is benefit of 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.

3.0 Meaning and Nature of Positive Law

Positive law is a legal term that is sometimes understood to have two meanings. In the narrow sense, it means law made by human beings.[18] That is, law actually and specifically enacted and, or adopted by proper authority for the government of an organized jural society. This term is sometimes, also used to refer to the legal philosophy, 'legal positivism' as distinct from the schools of natural law and legal realism.[19]

Basically, the application of positive law (in the narrow sense) to the Nigerian legal system shall be examined in this chapter. According to Black's Law Dictionary[20], positive law can be defined and explained as:

> A system of law promulgated and implemented within a particular political community by political superiors, as distinct from moral law or law existing in an ideal community or in some non-political community. Positive Law typically consists of enacted law – the codes, statutes, and regulations that are applied in the courts…the phrase positive law literally means law established by human authority. Also termed *jus positivum*; made law.

In this sense, positive law denotes a body of man-made laws, that is to say, laws validly or successfully enacted, promulgated, made or imposed by the state or government or a sovereign for the government of a political entity or community. The concept of positive law is distinct from natural law, which comprises inherent rights conferred not by act of human legislation but by 'God', 'nature', or 'reason'. In other words, for the purposes of natural law, 'nature' is believed to

[18] Internet Encyclopedia of Philosophy (IEP), *A Peer-Reviewed Academic Resource* <https://iep.utm.edu/legalpos/> accessed on February 4, 2023.
[19] *Ibid.*
[20] BA Garner, *Black's Law Dictionary* (9th edn, Minnesota: West, 2009) p. 1280.

be the legislator the supreme legislator; whereas, for the purpose of positive law, man is the legislator' the supreme legislator. Positive law prescribes the standard of behaviour in a jural society with a view of streamlining the conduct (behaviour) and activities of men. It requires certain level and kind of conduct from the people as well as prohibits certain activities and conduct. In relevant cases, positive law usually prescribes a penalty or sanction for breach or break of the law. It also recognizes certain acts as wrongs (torts) and provides appropriate remedy where a wrong occurs; hence the maxim, *ubi jus ibi remedium*. Positive laws are largely and usually written or codified. It is therefore more material and real than the principles of natural law which is believed to exist in nature and is discoverable by reason. Positive law to a very large extent is scientific; it is verifiable and also forecloses the chances of speculation regarding what constitutes the law.

4.0 Convergence of Positive Law and Natural Law

There is no escaping the fact that there are instances where positive law and natural law all converge. These instances of convergence encompass the following:

(a) *Convergence in Objective:* The general objective of law is to regulate human behaviour or conduct. Both natural law and positive law have or possess this regulatory character. The two laws are geared towards regulating or streamlining the conduct and activities of men as they relate, interact, or transact with one another in a jural society, political community or social environment. It is a truism that, in imposing certain obligations or standards of behaviour, positive law and natural law reinforce and supplement each other. For example, the moral duty not to harm or disturb another manifests as the Law of Torts, the moral duty to honour promises is expressed in the Law of Contract, the moral duty not to create or cause unjustified hazards for another can be found in rules of positive law on speed limits, public nuisance, traffic sign, roadworthiness, etc.

(b) *Serving as Means to a Common End*: Law is not in itself, an end; it is rather a means to an end. The end is justice. All things being equal, both natural law and positive law directs and guides the society toward that end, justice.

(c) *The Idea or Concept of Rights:* Natural law and positive law converge in respect of the idea of certain rights being in *esse* or recognized as natural, indispensable or fundamental to man and human existence. These rights include right to life, right to dignity of human person, right to private and family life, right to freedom of movement, right to freedom of speech and expression, right to freedom of peaceful assembly and association, etc. The fact is that the idea of (fundamental) rights is embraced by both natural law and positive law. The influence of natural law in this regard, cannot be over-emphasized.

(d) *Convergence in Prohibition of Certain Acts or Omissions:* Both natural law and positive law abhors and prohibits certain acts and omissions in the society. For example, natural law abhors acts like rape, abortion, prostitution, stealing, killing somebody, etc. These same acts are also abhorred and prohibited by relevant rules of positive law. They constitute criminal offences under positive law and have sanctions or penalties attached to them respectively. For example, in Nigeria, sections 316 and 318 of the Criminal Code[21] respectively, defines killing as the criminal offence of murder and manslaughter, and prescribes the penalty therefor.

[21] Cap C38, Laws of the Federation of Nigeria, 2004.

5.0 Disagreement Between positive Law and Natural Law

Notwithstanding the convergence of positive law and natural law, there are certain areas where their streams do not flow together; this is especially from the viewpoint of legal positivism. These areas of disagreement are hereby set out in summary, under two headings, to wit:

5.1 Separation of *Lex Lata* from *Lex Ferenda*

Legal Positivism revolves around the belief, assumption or dogma that the question of what the law is (*i.e. lex lata*), is separate from, and must be firmly separated from the question of what the law ought to be (*i.e. lex ferenda*). In this connection, John Austin[22] propounded that:

> The existence of law is one thing; its merit or demerit is another. Whether it be or be or be not is one inquiry; whether it be or be not conformable to an assumed standard, is a different inquiry. 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.[23]

Legal positivism admits that certain rules of positive law may be evil, condemnable, unjust or immoral, but, it insists that the quality of the law as it is, does not affect its validity. Put differently, legal positivism is saying that, the question of the goodness or otherwise of the law must be firmly kept separate from the question of its validity. Legal positivism maintains that the validity of a rule of positive law is dependent only on whether the law has been made or enacted in accordance with the requirements or procedure for law-making in the legal system in question. For example, in the Nigerian legal system, if a Bill is duly passed into law by the National Assembly or a State House of Assembly, such law becomes and remains valid in so far as it is consistent with the Constitution. The position is not altered by the quality or morality or reasonability of the contents of such law.

It is however, imperative to note that natural law theory does not necessarily concern itself with the drawing of distinction between *lex lata* and *lex ferenda*. Natural law proponents emphasize the unity of law, they believe that, it is either there is law or there is not. To them, for a rule of conduct to qualify as law in a legal system, it must for all purposes, derive force or validity from relevant natural law postulation(s). Natural law insists that human (positive) laws must stand or fall according to the dictates of natural law.

5.2 Inconsistent Claims of Supremacy

Natural law proponents believe that 'God' or 'nature' is the supreme legislator or promulgator of law. They contend that there is a kind of perfect justice and rational order which exist in nature, and is discoverable by man through the use of reason. Natural law claims supremacy over and above all human (positive) laws. Pursuant to this claim, natural law insists that all human (positive) laws must conform as closely as possible, to the dictates of natural law.

However, in most modern legal systems, the Constitution (which is a positive law), is usually elevated above every other law. For instance, section 1 of the Constitution of the Federal Republic

[22] Quoted in B Bix, *Jurisprudence: Theory & Context* (Durham: Carolina Academic Press, 2004) p.33.
[23] *Ibid.*

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of Nigeria, 1999 brands the Constitution with the stamp of supremacy and declares its provisions binding on all authorities and persons throughout Nigeria.

The inconsistent claims of supremacy by natural law and positive law, constitutes an area of divergence which cannot be over-emphasized in this paper. The relevant question now is: which of the respective supremacy claims prevails against the other? In the main, it appears to the researcher that that of positive law (the Constitution) prevails against that of natural law. This is usually manifested in the practical reduction of natural law to a mere persuasive tool for law reform or mere ideas which may influence the enactment of positive laws. On the other hand, people, relying on natural law as a higher law, sometimes resort to war, revolution, or declaration of independence, as a reaction or protest against the predominance of unjust, unreasonable or immoral laws in the legal system.

6.0 The Spirit of Legal Positivism in the Nigerian Legal System

In determining whether the Nigerian legal system is possessed by the spirit of legal positivism, the researcher herein draws his consideration, in the main, from certain decisions of the supreme court of Nigeria. For instance in the case of *Agunwa v Attorney-General, Federation*[24], the Supreme Court, *inter alia*, firmly stated that:

> A court of law is concerned with law as it is, and not with law as it ought to be. Accordingly, it is not the business of a court of law; indeed a court of law is not permitted, to ascribe meanings to the clear, plain and unambiguous provisions of a statute in order to make such provisions conform with the court's own view of their meaning or what they ought to mean in accordance with the tenets of sound social policy...I do not conceive that it is the duty of the courts, by means of ingenious arguments or propositions, to becloud, change, qualify or modify the clear meaning of the provisions of a Statute or Decree, once such provisions are plain, unequivocal and unambiguous.[25]

Also in *Ugba & Ors. v Suswan*[26], Adekeye, JSC, stated, *inter alia*, that:

> The main function of a judge is to declare what the law is, and not to decide what it ought to be. The business of law-making in that way is exclusively the responsibility of the National Assembly at the Federal level or State House of Assembly at the State level, all in Nigerian context. True, it is, that the populace looks forward to a judge charged with that responsibility, but they should always appreciate that his powers to do so are circumscribed by the dictates of the law. In short, justice to be disposed by the *judex* must be in accordance with the law...

Buttressing the above point and position, Ariwoola, JSC, in that same case[27], stated, *inter alia*, that:

> ...the courts are created and empowered to adjudicate on cases, applying the law as it is, but certainly not as it ought to be. That is a function of yet another arm of

[24] (1995) LPELR-SC.158/1994. Also reported in [1995] 5 NWLR (Pt. 396) 418.
[25] Per Iguh, JSC.
[26] (2012) LPELR-SC.191/2012 (Consolidated).
[27] *Ugba & Ors. v Suswan, supra.*

> government. The laws are made by and for man, not man for law. If a law made by the people for the people, is creating hardship, let the people sit down, and do something about it, through its law-makers. It is not for the court, in performing its functions of interpreting that, to alter and amend it.

Rejecting the view of the Court below (Court of Appeal), Uwaifo, JSC, in *A.-G., Federation v Guardian Newspapers Ltd.*[28] stated, *inter alia*, that:

> Issue 2 refers to some observations of Pats- Acholonu, JCA in the present case. It is true that the learned Justice devoted some passages in his judgement to the jurisprudential aspect of positive law and natural law, particularly the general precept of natural law which stands for what is good, and that if a law at any point, departs from natural law, it is no longer law but a perversion of law. In the course of that, the learned Justice seems to want to judge the validity of a law on the basis of ethics, morality and religion. The learned Justice may have gone far and away from the real issues. Somehow, I think, it must be conceded that that proposition is not only wholly irrelevant but it cannot be considered right...

In the Court of Appeal, Pats-Acholonu, JCA, was of the position that it is sheer timidity and an abdication by the court of its responsibility, if it hides under the *Austinian* theory to enforce a law which is inherently irrational and unjust;[29] it is this view of the Court of Appeal that the Supreme Court rejected.

From the foregoing position of the Supreme Court, it is deducible that the blood of legal positivism runs firmly in the veins of the Nigerian legal system as driven by the spirit of legal positivism. Hence, generally speaking, the Nigerian legal system only recognizes as law that which is duly enacted or promulgated into law by the National Assembly or a State House of Assembly, regardless of the quality or rationality or morality of the contents thereof. The recognition in Nigeria, of any other rule and/or regulation as law, must be pursuant and subject to the Constitution or a principal legislation, these other rules and/or regulations are called and known as subsidiary legislations. For a principle of natural law to apply in Nigeria, it need be recognised by way of legislation by the National Assembly or State House of Assembly as the case may be. Also, as we saw in chapter three of this work, no treaty between Nigeria and any other country becomes binding on Nigeria, save and until it is recognized or adopted by way of legislation, by the Nigerian National Assembly. All these are manifestations of the spirit of legal positivism in the Nigerian legal system.

7.0 Interrogating the Need for Reciprocity between Natural Law and Positive Law

The importance of law is such that it is difficult or even impossible, for a society to peacefully be in *esse* without law. In view of this assertion, it is apposite to say that the Nigerian legal system exists for the primary purpose of administration of justice; and for the maintenance of peace and order in the Federal Republic of Nigeria. Let us continue to remember that law is made for man and not man for law; and since this is the case, law should be directed towards the common good

[28] [2001] FWLR (Pt.32) 87 at pp.128-129.
[29] *Guardian Newspapers Ltd. v A.-G. Federation* [1995] 5 NWLR (Pt.398) 703 at pp.735-736.

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of man within the society. Little wonder under *section 4 of the Constitution of the Federal Republic of Nigeria 1999*, the legislative powers of the Federation of the federating states in Nigeria are to be exercised generally for the peace, order and good government of Nigeria.

In order to avoid a state of affairs which would be frequently afflicted with anarchy, war, revolution, clamour for independence, where life is nasty, brutish and short, the Nigerian legal system must be drained of the rigid blood of legal positivism; the spirit of legal positivism need to be cast out from the Nigerian legal system. Indeed, to draw a rigid line of distinction between law and morality, as the positivists advocate, is to strip law of its sacred obligatory feature and cut it off from natural law. It is a largely held view that unjust laws do not bind in conscience; others, even contend that an unjust law is no law, the expression of which is in the maxim: '*injusta non est lex*.' The positivists' position on the idea of law is strict and narrow because, it only concerns itself with *lex lata* (law as it is) and not *lex ferenda* (law as it ought to be). It maintains that the question of morality, is separate from, and must be separated from the question of legality. For instance, an act which is immoral can be legal; also an act which is morally sound can be illegal.

Is the positivists' strict/rigid idea of law holistic and right? No! *Nequaquam*! Because, it is highly doubtful, whether a legal system can attain its purpose (*i.e.* good government, administration of justice and maintenance of peace and order), if it is largely conceived as unjust, inherently unreasonable, or morally bankrupt by the very people who are supposed to abide by the laws, and for whom the laws in that legal system are made. For instance, many religious and cultural groups in Nigeria today, vehemently abhor and oppose acts considered as immoral, such as abortion, euthanasia, homosexual acts, same sex or transsexual marriage, prostitution, *etc.* If then, the National Assembly suddenly changes its current position and then goes ahead to enact laws which brand those immoral acts with the stamp of legality, it is likely that such laws would not bind the people in conscience and then, anarchy, protest, clamours, revolution, or crisis or collapse of public morality, order and safety would become imminent.

Notwithstanding its metaphysical approach to the nature of law, natural law proclaims ideals which are not disturbed by the non-conformity of rules of positive law with those ideals. In other words, natural law proclaims what the law ought to be, or say what the law ought to contain. Natural law insists that the content, substance or quality of a law sustains or vitiates the validity of that law. Jurists had however; become conscious of the fact that natural law constitutes a natural oil or lubricant, without which the machinery and application of positive law would inevitably experience all kinds of friction. Natural law has been defined as: 'a rule which so necessarily agrees with the nature of man that, without observing its maxims, the peace and happiness of the society can never be preserved'[30]. It is not in doubt that the existence of natural law has influenced many contemporary societies in legislating against or prohibiting certain highly immoral acts, such as, abortion, rape, homosexual, *etc.* Apart from that, natural law has had, and continues to have a refining influence on the quality and content of positive law in many legal systems. For instance, the natural law school provides the intellectual weapon for law reform; and for combating

[30] <http://thelawdictionary.org/natural-law> accessed on February 4, 2023.

despotism, marginalisation, tyranny, or arbitrariness in government.

The foregoing tends to establish that positive law is of essence; however, its quality and substance should largely be refined and controlled by natural law. Put differently, in the enactment, interpretation, and enforcement of any rule of positive law, a legal system should ensure that the principles of natural law are neither discountenanced nor transgressed. A good legal system must not therefore pitch its tent with legal positivism; rather it should strike a balance between the application of positive law and natural law. Hence, there should not be a firm or rigid separation of law as it is and law as it ought to be. There is therefore, need for a critical reciprocity vis-à-vis the application of positive law and natural law in any legal system, so as to forestall unnecessary friction such as perpetration of injustice, breakdown of peace and order, revolution, war.

8.0 Conclusion and Recommendations

Having painstakingly taken a voyage of comparative inquiry, into the application of natural law and positive law to the Nigerian legal system; and having studied the meaning and major attributes of natural law and positive law respectively, the researcher draws the following conclusion:

(a) That the Nigerian legal system is largely possessed by the spirit of legal positivism, and as such, emphasis is laid on what the law is or contains (positive law), as distinct and firmly separated from what the law ought to be or contain (natural law). For that conclusion, the researcher relies on the case of *Amoshima v The State*[31] wherein the Supreme Court of Nigeria held that 'The duty of the court is to declare and apply the law as it is, not to make or amend the law...' The supremacy clause in the Nigerian Constitution[32] also gives credence to that conclusion.

(b) That the quality or substance of a law in Nigeria does not necessarily or practically have a bearing on the validity thereof. Hence, once a law for instance, is duly enacted by the National Assembly and assented by the President (where assent is relevant), it becomes and remains valid, save and until, such law is altered, modified or repealed by the legislature through due process or procedure. Generally, Law in Nigeria derives force and validity from the provisions of the Constitution, not necessarily from the dictates of morality or natural law.

(c) That the application of natural law to the Nigerian legal system is presently by way of mere influence on the quality of positive laws. At most, natural law in Nigeria provides a platform, from which the legislature may be prompted, confronted or persuaded to enact, amend or repeal a law.

(d) That if the spirit of legal positivism is not cast out from the Nigerian legal system, its manifestation at any time remains imminent. For instance, the National Assembly have refused to legalize acts like abortion, same-sex marriage, euthanasia, etc, but then, if the spirit of legal positivism is not cast out from Nigeria, it is possible for the National Assembly to, at any time in the future, legalize any of such immoral act, and once due process is followed in the legalization, such act would become legal, though morally bankrupt.

[31] (2011) LPELR-SC.283/2009.
[32] Constitution of the Federal Republic of Nigeria, 1999; s. 1.

It is the researcher's recommendation that the Constitution be amended to expressly embrace a practical harmonious application of natural law and positive law in the Nigerian legal system. The idea of critical reciprocity should be constitutionally enshrined so as to forestall arbitrary enactment or enforcement of laws that are grossly unjust, largely immoral or inherently irrational, in the Federal Republic of Nigeria or any part thereof. For example, the Constitution can be amended to expressly provide that for any law to be valid, not only must due procedure or legislative process be followed, but also:

(a) it must not be morally bankrupt;
(b) it must not be inconsistent with the common good of Nigerians and Nigeria;
(c) the law-maker must not act *ultra vires* its legislative powers
(d) the citizens must not be unevenly yoked by the law

The researcher further recommends that a judge in Nigeria should only be tethered to positive law but should not be shackled thereto. In other words, the court should not only be concerned with 'law as it is' but also with 'law as it ought to be'. Since the court can declare a rule of positive law void, to the extent of its inconsistency, where it is shown to be inconsistent with the provisions of the Constitution; the Court should also have power to declare a law invalid where it is largely immoral, grossly unjust or inherently unreasonable. The researcher invariably recommends that the reasoning and position of Pats-Acholonu, JCA, in *Guardian Newspapers Ltd. v Attorney-General, Federation*[33] should be adopted into the Constitution. In that case, His Lordship stated, *inter alia*, that:

> A statute is inherently irrational and an assault to the psyche of the citizens when it is extra-ordinarily in conflict with reason, is offensive and utterly hostile to rationality and so emptied of substance that it should be rejected by the people to whom it is directed (or made for), and to the people of other nations who condemn it for its inhumanness. Such law should not and ought not be enforced... To hide under the *Austinian* theory to enforce such a law is sheer timidity and an abdication by the court of its responsibility.

Law as it is (positive law) should not be separated from law as it ought to be (natural law). Drawing an unnecessary distinction between the two may end up distorting or disrupting peace and order in Nigeria. It also causes the perpetration of injustice or production of manifest absurdity, in the course of administration of justice. The researcher hereby recommends that the Constitution of the Federal Republic of Nigeria be amended to ensure a critical reciprocity in the application of natural law and positive law in the Nigerian legal system. The researcher verily believes that such a reciprocal application will give rise to a better, balanced and secured Nigerian legal system.

[33] [2008] FWLR (Pt.32) 87 at 128 – 129.