

# Law and The Society in The 21<sup>st</sup> Century: Exploring The Relevance of Sociological Jurisprudence in Contemporary Nigeria

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## Abstract

*The clamor to restructure political arrangement of the Nigerian nationhood may be a longstanding one but not with the kind of zest with which protagonists of the movement have driven their views in the last decade. Sentiments aside, it is obvious that the breakdown of law and order and impunity by those in government, power brokers and their cronies has given unprecedented impetus to the conclusion of several Nigerians that it is better to restructure the basis of our existence as a nation than wait to witness the fallout of Nigeria as a failed state. Looking at the root cause of breakdown of law and order in Nigeria from the perspective of her Legal Order therefore, the paper queried the positivist philosophy that has been the pivot of Nigeria's legal order, arguing that for law to compel obedience, it must generate from the core values of the society it seeks to govern because law ought not to be an abstract set of rules imposed from the top. Instead, it must be indigenous to the people and partaking of their culture. Taking a position that the attitude by which law is left only to skillful reasoning of positivist philosophy as exist in Nigeria without adaptation to the core values of the Nigerian society defeats the intended ends of law, the paper argued that such attitude has only caused respect for the law only in breach and disregard of its mandate by the society. It is for this reason the paper recommends a shift towards sociological philosophy as the way out of the quagmire into which Nigeria is steadily devolving. In the end, bioethics concept has also been recommended as a supplement to cater for traditional criticism of sociological philosophy.*

**Key Concepts:** Law, Society, Sociological Jurisprudence and Contemporary Nigeria.

## Introduction

Law was made for the society and not otherwise because the society predated the law.<sup>1</sup> The function of law therefore is to regulate social behaviours with a view to ensuring rule of law at all times.<sup>2</sup> Thus, where a law is fashioned towards creating a society of its own dreams, without putting into consideration existing cultural values, a form of conflict of interest could result, causing anarchy and acrimony that may disintegrate the fabric of social existence in such society.<sup>3</sup> This is why every law that must generate impact must arise from the people's culture and not a contrivance of an alien culture or an elitist package, driven by elitist political class and serviced

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<sup>1</sup> Roberto M.U; "Law in Modern Society: Towards a Criticism of Social Theory" Sourced at <https://en.m.wikipedia.org/wiki/Law> Accessed on 04-12-2019.

<sup>2</sup> Edward-Jenks, E.J; "The functions of Law in the Society" *Journal of Comparative Legislation and International Law* 3<sup>rd</sup> Series, Vol. 5, No. 4 (1923), pp. 1169-177 Sourced at <https://www.jstor.org/stable> Accessed on 04-12-2019.

<sup>3</sup> Matthew O.J. "Law, Effect and Social Norms" Stanford News Report Sourced at <https://news.stanford.edu> Accessed on 04-12-2019.

by robot security agencies that have no bearing with values of the commoners.<sup>4</sup> In the Nigerian situation, if the laws must move the society further than it is presently, the crux of law-making must lie in what Jegede describes as “the social relations of laws rather than its metaphysics or its formal logic”.<sup>5</sup>

This is the tone set by sociological philosophy which insists on looking at the society as key to better understanding of the law because, law is not an absolute, static body of rules in itself but relative to time, place and society.<sup>6</sup> With the outcry against every aspect of Nigeria’s body polity, including the basic laws, political arrangement, the society outfit and everything about social services, it is obvious that such systematic failure calls for a revisit to philosophical basis of the social contract that brought together various ethnic groups that make up the geographical expression called, Nigeria.

No doubt, rule of law with all that it imports is what marks out a civil society from one ruled by anarchy. For almost six decades after independence, Nigeria has rattled through several Republics, regimes, and administrations in search of rule of law that accords with the standard endorsed under the International Covenant for Civil and Political Rights (ICCPR), a United Nations Convention to which Nigeria is signatory.<sup>7</sup> Quite unfortunately however, the dream of such an ideal State has eluded Nigeria and her very expectant heterogeneous people over the years, for so many reasons. The most prominent of such reasons include incessant *coup d’etat* that truncated each of the Republics and botching Nigeria’s Constitutional evolution; religious violence and an entrenched form of corruption that has become so endemic that even members of the public now see it as a norm, rather than an aberration.<sup>8</sup>

Today, Nigeria may not be reckoned as a failed State, but indications are rife that such ugly status is only waiting to manifest with time. Today, corruption has become more intense, with all impunity under a regime that came on board, on the premise of anti-corruption crusade; and beyond this is the intensity of several forms of violent crimes, including robbery, murder, kidnapping, political thuggery and all forms of economic crimes evolving in different forms, despite claim to extravagant spending on security, with little or nothing to show for it.<sup>9</sup> With the indices on ground presently, it is obvious that not even *Saints* amongst politicians in Nigeria can salvage the country from the multi-dimensional murky quagmire into which she is being drawn, on daily basis, by the hands of every acclaimed *political-Messiah*. This is because, the problem of this country appears

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<sup>4</sup> Kwadwo, A.T.; ‘Civil Society, Human Rights and Development in Africa: A Critical Analysis’ <[Bradford.ac.uk/social-sciences/.../pdf](http://Bradford.ac.uk/social-sciences/.../pdf)> accessed on 20-05-2016

<sup>5</sup> Jegede, M.I, *What is wrong with the Law?* (Abuja : Nigerian institute of Advanced Legal studies press, 2009)

<sup>6</sup> Etudaiye, M., ‘The Relevance of the Sociological School of Jurisprudence to Legal Studies in Nigeria’ In *UNILORIN Reading in Jurisprudence and International Law*. <[unilorin.edu.ng/publications/etudaiye/...](http://unilorin.edu.ng/publications/etudaiye/)> accessed on 13-10-2015

<sup>7</sup> International Covenant on Civil and Political Rights, 1966 (hereinafter referred to as ICCPR).

<sup>8</sup> Ogbu C. “The Problem with Nigeria” Sourced at [saharareporters.com](http://saharareporters.com) Accessed on 03-12-2019. See also Olasope K. “A Fresh Look at Nigeria’s Major Problems” Sourced at <https://punching.com>>a-fresh-look-at-nigeria’s-major-problem Accessed on 03-12-2019.

<sup>9</sup> Oko, Edidiong, *ectal*; “Is Nigeria a Failed State?” Sourced at <http://creativecommons.org/licenses/by-nc/3.0/>) Accessed on 29-11-2019.

to be more systemic than it is about political structure that has drawn a lot of national debate very recently.

As a matter of structural principle, the tendency has been that we cannot discuss systemic issues without determining the philosophy upon which to dislodge the existing system for a new dawn. The question then is, in the face of inefficiency, or is it inability of the present legal order to answer to the yearnings of Nigerians even in the hands of their most trusted actors, would it not be preferred to look inward, in search of a more workable philosophy that would better address the forces of evil against the land before they destroy the society that is the basis of the Nigerian nationhood? This is the question that informed this paper which presents sociological philosophy as alternative to the positivist philosophy that has been the pivot of the Nigerian legal order, over the years. In the end, *Bioethics* is employed as support-concept to shove up what scholars have always identified as inherent weakness in sociological philosophy. In any case, before proceeding to the heart of discussion on sociological philosophy, let us, for clarity, discuss import of Natural Law as forerunner of positivism which is the pivot philosophy of the Nigerian legal order and then, look at the centrality of positivist philosophy in the Nigerian Legal Order today and how it has fared thus far.

### **History of Natural Law in the Nigerian Legal Order.**

For caution, it must be mentioned that because of the divisive nature of people's belief in God and since natural law is usually alluded to bequeathal of nature by some scholars, this paper has deliberately played down on the details of import of natural law philosophy for its pivotal properties alone since it is understood that by and large, details of sociological philosophy that is the central subject of this paper must reflect on cultural, moral and religious beliefs of the society as inevitable features of natural law. For now, it may be sufficient to recall that Britain, the colonial power from where Nigeria inherited her formal legal system had, in practical terms, long before Nigeria became a Nation, leaned towards natural law principles, and engaged in the defense of moral and religious norms in her legislative and judicial practices.<sup>10</sup>

Thus, the courts at sundry times openly declared that the function of Judges was "to promote virtue and morality and to discourage vice and immorality" because as they reasoned, "the purpose of law was the enforcement of morals".<sup>11</sup> It was on that score that Darling, J; declined to grant the rent-award sought by the petitioner which evidence disclosed was a prostitute and who the court described as "an immoral woman, being the kept mistress of a certain man" and consequently, as the court reasoned, the rent in issue was "the price of her immorality".<sup>12</sup> As the Court put it:

I do not think that it makes any difference whether the defendant is a common prostitute or whether she is merely the mistress of one man, if the house is let to her for the purpose of committing the sin of fornication

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<sup>10</sup> Munby, J., 'Law, Morality and Religion in The Family Court'; being a keynote address delivered by Sir Munby, J., President of the Family Division of Royal British Court of Justice, at the Law Society Family Law Annual Conference in London on 29<sup>th</sup> October, 2013. <[www.judiciary.gov.uk/.../law-morality...](http://www.judiciary.gov.uk/.../law-morality...)> accessed on 22/11/2014 . See also Jeroen, T., 'Are State Churches Contrary to International Law?' *Oxford Journal of Law and Religion*, (2013) Vol. 2 No. 1, O 175; Lewis, B.V., 'Religious Freedom, The Good of Religion and The Common Good: The Challenges of Pluralism, Privilege and the Contraceptive Services Mandate' *Oxford Journal of Law and Religion*. (2013) vol. 2 No. 1, 25.

<sup>11</sup> *Constantinidi v. Constantinidi and Lance* (1905) 1KB. 253 per Sterling L.J, See also *Uptill v Wright* (1911)1KB, 506.

<sup>12</sup> *Uptill v Wright* supra. See also Wittle, J.J.R., 'Church, State and Marriage: Four Early Modern Protestant Models' *Oxford Journal of Law and Religion* (2012) Vol.1 No.1.

there. That fornication is sinful is clear. The litany speaks of fornication and all other deadly sins, and the litany is contained in the Book of Common Prayer which is in use in the Church of England under the authority of the Act of Parliament.<sup>13</sup>

As at 1878, when Annie Besant published a book, describing and recommending various methods of birth control, the jury described it as “obscene libel” for which she was deprived of custody and access to her seven year old daughter,<sup>14</sup> similar to the judgment against an adulterous woman within the same period.<sup>15</sup> As Sir Cresswell said in 1862, “glossing over such behaviour would have a salutary effect in the interest of public morality that it should be known that a woman, if found guilty of adultery, will forfeit, as far as this court is concerned, all rights to the custody of, or access to her children”.<sup>16</sup> Adultery in Nigeria is not only a moral issue but central to the teachings of major religions in Nigeria.

Religion, no doubt, fortifies moral values which determine social reaction to a particular law and it is apparent from this decision that both morality and religion had strong foothold on the laws regulating British society at the time. Incidentally, it appears that this is the philosophy of law that was eventually imported as an integrated part of the Nigerian legal system, where religion and moral values play central role. In the Nigerian situation, Islamic law is adopted as source of Nigerian law, thus making religion and religious values integral aspect of Nigerian jurisprudence. Indeed, in the Nigerian situation, by recent decisions of the Supreme Court, the cloak of validity test to which Islamic law used to be subjected has since been removed, thus strengthening the place of religious mores in the Nigerian legal system.<sup>17</sup>

Before the *Wolfenden Committee Report*<sup>18</sup>, British Courts were enthusiastic about of the view that the function of Judges as natural law promoters was to promote virtue and discourage vice and immorality, understandably, by the dominant influence wielded by the Church. However, this influence was to start waning through critical input of several philosophers in the 19<sup>th</sup> and 20<sup>th</sup> Centuries.<sup>19</sup> In 1859, John Mill struck the first salvo against the *status quo*, when he wrote:

[T]he sole (reason) and for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection... the only purpose for which power can be rightly exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant.<sup>20</sup>

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<sup>13</sup> Ibid

<sup>14</sup> In *Re-Besant* (1878)11 Ch.D 508.

<sup>15</sup> *R v Bradlaugh* (Charles) and Besant (Annie) (1877)2QBD569 also in (1878)3QB607.

<sup>16</sup> *Seddon v Seddon and Doyle* (1862)2SW&Tr 640-642

<sup>17</sup> *Mr. NosaTawodiGiwaOsagie v Alhaji R.O.V GiwaOsagie&anor* (2009) LPELR-4533 at 2-4. See also *KharireZaridan v FataraweKhililMohssen*(1994) UILR at 211-290. and Ladan., op.cit., at 212

<sup>18</sup> *Wolfendon Committee Report on Homosexuality and Prostitution*, 1957.

<sup>19</sup> Mills, J.S. and Sir Stephen, J., in the Nineteenth Century and Professor Herbert Hart and Sir Patrick Devlin (Devlin, J) in the mid-twentieth century.

<sup>20</sup> Mills, J.S., ‘On Liberty’ <[cyberpat.com/shirlsite/./mills.html](http://cyberpat.com/shirlsite/./mills.html)> accessed on 12-04-2016

As if to post a rejoinder to Mill's position, Stephen said "restraints on immorality are the main safeguards of society against influence which might be fatal to it".<sup>21</sup> To him, as a protagonist of natural law, the purpose of law, both criminal and civil, is in "promoting virtue and preventing vice" because, as he reasoned, criminal law "is in the nature of a persecution of the grosser form of vice".<sup>22</sup> In the midst of what looked like philosophical controversies came the *Wolfenden Committee Report on Homosexual Offences and Prostitution*,<sup>23</sup> which recommended that the functions of criminal law should relate only to how:

[T]o preserve public order and decency; to protect the citizen from what is offensive or injurious, and to provide sufficient safeguards against exploitation and corruption of others... It is not in our view, the function of law to intervene in the private lives of citizens, or to seek to enforce any particular pattern of behavior, further than is necessary to carry out the purpose we have outlined.

This, no doubt, was a major departure from the tenets of natural law and Denning's reaction to Wolfenden Report in the House of Lords was swift, denouncing homosexuality as "unnatural vice that strikes at the integrity of the human race."<sup>24</sup> To the question whether such conduct was "so wrongful and so harmful that, in the opinion of parliament, it should be publicly condemned and, in proper cases, punished," Denning was emphatic, insisting that "the law should condemn this evil for the evil that it is."<sup>25</sup> Denning found a ready support in Devlin a major Natural proponent who, only two years later, in his *Maccabean lecture* on the Enforcement of Morals, maintained that "an established morality is necessary as good government to the welfare of society" because as he reasoned, the society "disintegrates... when no common morality is observed."<sup>26</sup> Thus, he held that "the suppression of vice is as much the law's business as the suppression of subversive activities; it is more possible to define a sphere of private morality than it is, to define one of private subversive activity."<sup>27</sup>

Similarly, the House of Lords in 1961 upheld a conviction of corruption of good morals, on the basis that holding otherwise would amount to abdication of the role of the Court in enforcing public morality.<sup>28</sup> In his judgment, Viscount Simmonds said:

In the sphere of criminal law, I entertain no doubt that there remains in the courts of law, a residual power to enforce the supreme and fundamental purpose of the law and order but also the moral welfare of the State, and that it is their duty to safeguard it against attacks which may be the more insidious because they are novel and unprepared for.<sup>29</sup>

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<sup>21</sup> Stephen, J., 'Liberty, Equality and Fraternity'. <[www.oll.libertyfund.org/titles/572](http://www.oll.libertyfund.org/titles/572)> Accessed on 14/01/2015. See also Stephen, J. in *Seddan v Seddan and Doyle*, *supra*.

<sup>22</sup>*Ibid* at 146

<sup>23</sup>Wolfenden Report, *op cit*

<sup>24</sup> Denning, L.J., On *Wolfenden Report*<[archive.thetablet.uk/.../the-wolfenden-report](http://archive.thetablet.uk/.../the-wolfenden-report)> accessed on 12-04-2016. See also Munby, *op.cit*; at 3

<sup>25</sup> Denning, L.J; *op.cit* at 3

<sup>26</sup>Devlin ,P., *The Enforcement of Morals* (Oxford: Oxford University Press, 1965)13-14, 15,17.

<sup>27</sup> *Ibid* at 17

<sup>28</sup> *Shaw v Director of Public Prosecutions* (1962)AC 220 at 267. per Sir Simonds L .J.,

<sup>29</sup> *Ibid*; at 267

Beyond this, he conjectured that even if homosexuality between consenting adults was decriminalized in the future, the court must stand up to any attempt to publicly advocate and encourage such practice.<sup>30</sup>

Quite unfortunately however, Vicount's view lapsed, not long after, with a marked difference between what obtained only some one hundred years earlier, and later.<sup>31</sup> Indeed, barely six years after the Nigerian independence, several sweeping reforms were made to stripe naked, the *hitherto* adorned maiden of morality and religion as central components of natural law in Britain and most parts of Europe.<sup>32</sup> Describing the difference between the relationship between law, morality and religion in the past and what it is now, Munby said "for those who have grown up in the modern world, it is hard to comprehend the immense gulf which separate our world from theirs".<sup>33</sup> He praised the present regime as an enthronement of the era of secularity footed in positivist philosophy which he said had taken over from what he referred to as "commonly accepted package of moral and religious values." This was the kind of hybrid philosophical evolution in which Britain was engrossed when it colonized and influenced Nigeria, her colonial subject in the same direction of natural law, embellished with positivist philosophy whose entrenchment in the British system at the time was the vogue. For clarity, let us examine the Constitutional trend in this behalf.

### **Positivist Philosophy in the Nigerian Legal Order**

The political landscape of Nigeria having been dominated by Britain as her colonial authority for several decades, its influence upon Nigeria's legal history was inevitable. Today, no matter how much natural law philosophy influences the nature of law in Nigeria, probably through the natural interface between core values that dictate who we are and who we seek to be, but it is obvious that positivist philosophy remains the main platform upon which the Nigerian legal order rests. To the positivists, law is the command of a sovereign authority intended to be obeyed by the subjects, supported by sanction which sovereign authority may be a monarch or an institution.<sup>34</sup> As Austin, a forefront positivist put it, law in its most comprehensive signification is "a rule laid down for the guidance of an intelligent being by an intelligent being having power over him" which Dias said could only be accomplished by a determinate person or body, since an indeterminate body cannot express wishes in the form of commands.<sup>35</sup> They insist that there is no connection between law, morality, justness, fairness and law because they regard such indices as too external to law and therefore, ordinary metaphysics, not scientifically testable to form the basis for validity of man-made laws; which they argue are self-sustaining once they pass through due legislative process.<sup>36</sup> But positivist philosophy has always been doomed in the Nigerian setting because, while natural law definition bears a lot of semblance to some laws in the Nigerian legal system, the same cannot be safely said of the positivist concept of law in Nigeria, especially as regards the customary law

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<sup>30</sup> *Ibid*; at 267

<sup>31</sup> Munby, *op.cit.* Ironically, recent decision of Britain to exit the European Union seems to point to realization that the Nation's core-values cannot step aside for foreign policies. See [www.theguardian.com](http://www.theguardian.com); [www.tes.com/teaching-resource](http://www.tes.com/teaching-resource);

<sup>32</sup>The Family Planning Act, 1969 was passed; Homosexuality was decriminalized; Abortion legalized and sex between consenting adults of the same sex was decriminalized; all in 1969. It was pursuant to these reforms that the courts began to toe contrary position to *Shaw v DPP* until the West and America devolved to the realm of legalizing today, what they used to punish as immoral.

<sup>33</sup> Munby, *op.cit.*, at 5.

<sup>34</sup>Ladan M.T: Introduction to Jurisprudence (Lagos: Malthouse Press Limited, 2010)21

<sup>35</sup> Austin, J., *the philosophy of Positive Law*, 5<sup>th</sup> edn vol.1 (London: John Murray, 1885)87

<sup>36</sup> *Ibid*

and Islamic law both of which now assume integral sources of the Nigerian law.<sup>37</sup> For example, Austin, a core positivist's definition of customary law beats hollow this source of the Nigerian legal system when he said:

[A]t its origin, a custom is a rule of conduct which the governed observe spontaneously not in pursuance of a law set by a political superior. The custom is transmitted into positive law, when it is adopted as such by the Courts of justice, and when the judicial decisions fashioned upon it are enforced by the power of the State. But before it is adopted by the courts and clothed with the legal sanction; it is merely a rule of positive morality; a rule generally observed by the citizens or subjects, but deriving the only force which it can be said to possess, from the general disapprobation falling on those who transgress it.<sup>38</sup>

This definitely does not fit into Austinian definition of law as a Command of a sovereign, properly so called, thus casting doubt on the value accorded it in the Nigerian jurisprudence.<sup>39</sup> Indeed, it is apparent from the court's decision in *Labinjoh v. Abake*<sup>40</sup> that a customary practice that sails through the validity test is automatically binding on the parties as their existing customary law as long as there is no evidence that they intend to be bound by English law. The implication of this is that a customary law is not "posited" by the decision of the court or the Austinian superior being, since it is intrinsically "a mirror of accepted usage".<sup>41</sup> This is what the Nigerian Court of Appeal was pointing to, when it defined customary law as:

The unrecorded tradition and history of the people which have 'grown' with the 'growth' of the people to stability and eventually becomes an intrinsic part of their culture. It is a usage or practice of the people which by common adoption and acquiescence and by long invariable habit has become compulsory and has acquired the force of law with respect to place or the subject matter to which it relates.<sup>42</sup>

Beyond this, it appears that positivism either by Bentham, Austin or any other, in the line-up does not wholly represent modern idea of law which binds, not only the subjects but even the three arms of government, which is the scenario under the Nigerian law.<sup>43</sup> Beyond this is the fact that Nigeria being a religious society, the people's concept of law, to all intense and purposes is influenced by their religious, moral and cultural belief. This is why even when the Constitution of the Federal Republic of Nigeria, 1999 prohibits adoption of any belief as State religion, yet it provides for

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<sup>37</sup> See *Kharic Zaidan v Fatima Khalil Mohssen* (1973) 1ALLNLR 88 at 101 where the Supreme Court of Nigeria defined customary law as "any system of law not being the common law and not being a law enacted by any component legislature in Nigeria but which is enforceable and binding within Nigeria as between the parties subject to its sway."

<sup>38</sup> Austin, *op. cit*

<sup>39</sup> *Ibid*

<sup>40</sup> 1924) 5NLR 33 at 36

<sup>41</sup> *Owoniyi v Omotosho* (1961) 1 All NLR 304 at 95

<sup>42</sup> *Aku v Aneku* (1991) 8NWLR (pt.209) 280. See also Rattigan, W.H *Digest of Customary Law*, 13<sup>th</sup>edn (Delhi: The University Book Agency, 1953) 8 defining customary law as practice 'composed of a large body of rules observed by communities, endorsed by long usages and founded on pre-existing rules sanctioned by the will to the community'.

<sup>43</sup> Samba, J. N., *Fundamental Concepts of Jurisprudence* (Makurdi: Bookmakers Publishing, 2007) 243.

Islamic Court system and as a policy, various levels of Government provide for regulatory agencies for religious pilgrimages at both State and Federal levels. This is the same Constitution that in its preambles, asserts that

We the people of the Federal Republic of Nigeria, having firmly and solemnly resolved to live in unity and harmony as one indivisible and indissoluble sovereign nation *under God*, dedicated to the promotion of inter-African solidarity, world peace, international cooperation and understanding... do hereby make, enact and give ourselves the following Constitution thus showing the centrality of God in the affairs of the Nigerian people.

In the spirit of core positivism, the said Constitution provides that:

1. (1) This Constitution is supreme and its provisions shall have binding force on the authorities and persons throughout the Federal Republic of Nigeria.
- (2) The Federal Republic of Nigerian shall not be governed, nor shall any Persons or group of persons take control of the Government of Nigeria or any part thereof, except in accordance with the provisions of this Constitution.
- (3) If any law is inconsistent with the provisions of this Constitution, this Constitution shall prevail, and that other law shall, to the extent of the inconsistency, be void.

This section, no doubt surrogates all other laws and values to the provisions of the Constitution in the spirit of positivist philosophy but in the face of failure of almost every posited law to ensure rule of law in Nigeria, the need to shop for an altogether different philosophy as basis of the Nigerian Legal Order has now become inevitable if the society must not disintegrate.

Looking at morality and religion as central to various ethnic groups in Nigeria, it is apparent that they do more to effectuate ultimate purpose of the law and that explains why these two properties of natural law have maintained a very strong grip on the positivist disposition in the Nigerian Legal Order. The question here then is, how well has this hybrid philosophical setting fared and promoted rule of Law in Nigeria over the years and if not, what alternative may be adopted in the overall circumstances having regards to some ugly systemic developments in the country.

All said and done; it appears that at no other time has the need to import each society's social, cultural, and religious values as part of index to their legal order been more compelling than as we have today in Nigeria where existing framework seems to defy all measures for result-oriented enforcement. This is the gap which, by the preamble of Zamfara State Sharia Criminal Code, the said law was designed to achieve, although with several Constitutional hick-ups, all the same.

### **Systemic Failure of Nigeria's Legal Order**

Since independence in 1960, successive Constitutions have tended towards positivism, investing ultimate, fundamental authority in the Constitution and annulling every law that does not align with provisions of the Constitution.<sup>44</sup> Indeed, by its format, the Constitution majorly places standard of recognition only upon laws that are *posited*, especially in criminal matters, and within

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<sup>44</sup> Especially as endorsed by express provisions of the Republican Constitution in 1963 and subsequent once till date.

the privileged customary law system.<sup>45</sup> It is in pursuance of this philosophy that National Assembly and Houses of Assembly of various States have made laws covering criminal Laws, Commercial Laws, anti-corruption laws, Economic Crime Laws, kidnapping and all other social, political and procedural Laws upon which successive administrations have run Nigeria over the years, without any remarkable success.

Along with the rampancy of corruption is failure of rule of law at all levels in Nigeria.<sup>46</sup> The concept of the Rule of Law entails equality before the Law, renunciation of violence for due process of Law, certainty of the law, reasonable access to the court of law and independence of judiciary with all its imports.<sup>47</sup> With the happenings in Nigeria today, it is worrisome if apart from those in authority, any Nigerian can still vouch for Rule of Law in the Nigerian society. There is daily occurrence of all forms of violent crimes including broad-daylight robbery, kidnapping for ransom, extortion, ritual killing, and terrorist's activities at village, communal, urban and national levels under the watchful eyes of countless models of security outfits that Nigeria never knew before, in her about sixty years of independence.<sup>48</sup> Failure of security apparatus has become so overwhelming that recently, the Federal Government called for Constitutional amendment permitting State Police which call is interpreted in some quarters as Federal Government's admission to its security failure or seeking a scapegoat for its ineptitude.<sup>49</sup>

The grim of this situation probably informed the call by former Chief of General Staff, Major General Theophilus Danjuma sometimes in 2018 that, Nigerians should rise to defend themselves in the face of security failure and ineptitude on the side of the Armed Forces.<sup>50</sup> It is more disturbing that most of the politicians, including some serving Governors are said to be sponsors of some of these mayhem to stampede the society into overlooking their corrupt practices in the name of security management.<sup>51</sup> As a matter of practice, some sponsors of the violent outfits never minded to recall their arms from the thugs after each election thus explaining why where security personnel decide to intervene, there have been reports of casualty of men that were fully kitted in Army uniform, who the Armed Forces Command disowned after all.<sup>52</sup>

In the face of lack of order as is the situation in Nigeria now, one would have resorted to the Court as the last hope for the Rule of Law and of the common man but having regards to the extent to which the federal administration has denigrated and desecrated the judicial system in the name of its policy of selective anti-corruption crusade, only for purposes of vendetta, and having regards to reports of threat of Chief Judges by Governors of various States, toeing the President's example, it is difficult to see if anything is left of the judicial system that could be described as the third arm

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<sup>45</sup> Section 1 of the Constitution of the Federal Republic of Nigeria, 1999 speaks volume in this regard.

<sup>46</sup> Ogbu op.cit.

<sup>47</sup> Elijah, J "The Rule of Law in Nigeria: Myth or Reality?" Sourced at <https://www.researchgate.net/publication/315122119> Accessed on 15-12-2019.

<sup>48</sup> Olowu D.; "Crime and Violence in Contemporary Nigeria: A Socio-Legal Therapy for Sustainable Democracy" Sourced at <http://dx.doi.org/10.4344/ifep.v10i1.23480> Accessed on 06-12-2019.

<sup>49</sup> Adedeji, A; "State Police in Nigeria: Issues and Challenges" Sourced at <https://www.academia.edu/StatePolice> Accessed on 06-12-2019.

<sup>50</sup> Adamiu, D; Insecurity: Danjuma Urges Nigerians to Defend Themselves Sourced at [tarabastate.gov.ng/insecuritydanjumaarguesnigerianstodefendthemselves](http://tarabastate.gov.ng/insecuritydanjumaarguesnigerianstodefendthemselves)" Accessed on 05-12-2019.

<sup>51</sup> Oge, U; Deputy Accuses Governor Bello of Sponsoring Violence in Kogi" Sourced at <https://www.premiumtimesng.com> Accessed on 05-12-2019.

<sup>52</sup> *Ibid*

of Government.<sup>53</sup> The situation is made worse by the precedent where an administrative tribunal like the Code of Conduct Bureau could be summoning and trying the Chief Justice of the Federation in a line of events that led to his resignation.<sup>54</sup> When the judicial system is cowed and rendered impotent, it is obvious that the system is on the verge of parking up for disintegration.

As things are now, it is apparent that the present political arrangement, including the entire Constitutional framework seem to fail the country but instead of re-examining the philosophy informing the Nigerian Legal order, several Nigerians have been advocating political structural adjustment.<sup>55</sup> If history must not repeat itself, then Nigeria must learn from the mistake of USSR whose long struggle with the need to maintain structure of the country's union at the expense of a revisit to the then failing Communist Ideology led to the disintegration of the union in such an abbreviated form that some of the casualties in form of weak States have not been able to find their feet.

If Nigeria must disintegrate like the former USSR, it must be in peace and not in pieces. If the system must not part in pieces, then it requires a measure that could hold it together on a legal philosophy that is inward looking. This is why this paper presents sociological philosophy as alternative to the positivist philosophy whose arrangement appears unsustainable under the present circumstance. In the end, Bioethics is recommended as support-concept to shove up what scholars have always identified as inherent weakness in sociological philosophy.

### **Sociological Philosophy: The Sanity in the Nigerian Legal Order**

As far back as 1904, Pound had already started to make a strong case on the need for sociological jurisprudence as the panacea for effective rule of law.<sup>56</sup> Although several jurisdictions hardly took such calls seriously, but it is apparent that with challenges to rule of law in various countries of the world in recent years, the clamour for a pride of place for sociological jurisprudence in law-making, is fast attracting consideration by jurists and scholars, particularly in Nigeria.<sup>57</sup>

To those in sociological school, law should be viewed only from the functional approach of what it does in a particular society, meaning then that law must be defined relative to the functions it performs in each society.<sup>58</sup> This is why Jhering prefers to see law only as a type of social control while Ehrlich would rather categorize law into living and formal law, seeing the living law as the reflection of the conduct of the society at a particular time, upon which Pound propounded his

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<sup>53</sup> Ibeku, M; "Nigeria's President Sacks the Chief Justice weeks before an Election" Sourced at <https://www.economist.com>" Accessed on 05-12-2019. Only in December, 2019 the State security service, an Agency oversees by the presidency stormed a Federal High court sitting in Abuja in the guise of re-arresting a man that the court already granted bail.

<sup>54</sup> *Ibid*

<sup>55</sup> Eze, K.T. & Ideobodo N; "Political Restructuring in Nigeria: The Need, Challenges and Prospects" Sourced at <https://www.researchgate.net> Accessed on 06-12-2019.

<sup>56</sup> Pound, R., 'The Need of Sociological Jurisprudence' in: Wrightington, S.R., and Wyman, W.F., (eds). *The Green Bag Bostons* ((Boston: Boston Books Company 1904) vol.XIX, at 17 <[www.jus.u.o.roscoe/...mlhp](http://www.jus.u.o.roscoe/...mlhp)> accessed on 25-07-2014.

<sup>57</sup> Etudaiye, M., 'The Relevance of the Sociological School of Jurisprudence to Legal Studies in Nigeria' In *UNILORIN Reading in Jurisprudence and International Law*. <[unilorin.edu.ng/publications/etudaiye/...](http://unilorin.edu.ng/publications/etudaiye/...)> accessed on 13-10-2015

<sup>58</sup> Asein, J.O., *Introduction to Nigerian Legal System* (Lagos: Alaba Press Limited, 2005) 9

social engineering theory of law.<sup>59</sup> This informed the French Declaration of Man and Citizens of 1789 definition of law as “an expression of the will of the community”.

By the end of the 19<sup>th</sup> century, matters relating to health, welfare, education and economy had started to attract State attention because in the face of rapid increase in population and industrial revolution, so much social inequality became a prevalent phenomenon that required regulation through the law.<sup>60</sup> The situation thus influenced adjustment of legal theory towards a more functional approach which emphasized the need to see law, more as an instrument of social control and communal existence.<sup>61</sup> By the turn of the 20<sup>th</sup> century therefore, the need to study what the law does, to be able to understand law itself, became the centre-spread of legal theory in form of sociological school, which stressed the need to step down individual, for social interest.<sup>62</sup> Summing up the main tenets of sociological jurisprudence, Wiles said:

The focus is no longer on the legal system... as accepted, but on understanding the nature of social order through a study... the study is not primarily to improve the legal system but rather, to construct a theoretical understanding of that legal system in terms of the wider social construct.<sup>63</sup>

It was in furtherance of this that notable legal Scholars and philosophers like Auguste Comte, Herbert Spencer, Leon Duguit, Rudolf Von Jhering, Eugene Ehrlich and Roscoe Pound rose to prominence.<sup>64</sup> Comte, regarded as the founder of sociology, influenced by result of scientific orientation in his time, defined sociology as the science of social order and progress with the distinctive feature of capacity for improvement and development through scientific principles.<sup>65</sup> He reasoned that through a form of experimental study and observation, a measure of fair and just society, could be ensured.<sup>66</sup>

In Spencer’s view, legislation as an attempt to improve social organizations will always fail except they are allowed to evolve in a manner reminiscent of Darwin’s law of evolution.<sup>67</sup> In his principle of social solidarity, Duguit maintained that man exists only as a member of a community and that all human activities should therefore be directed towards the end of “smoother and further working of men with men”.<sup>68</sup> He insisted that all institutions must be judged by their contribution to social solidarity, canvassing strongly that the State is an organization justified or otherwise by its furtherance of the principle of social solidarity.<sup>69</sup> He said for every positive law to be adjudged as

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<sup>59</sup> Ehrlich, E., ‘Review of Fundamental Principles of the Sociology of Law’ <[chicagobound.uchicago.edu/.../](http://chicagobound.uchicago.edu/.../)> accessed on 10-06-2016.

<sup>60</sup> Samba, *op.cit.* 76.

<sup>61</sup> *Ibid*

<sup>62</sup> Asien, *op.cit.* 14

<sup>63</sup> Wiles, P., ‘Sociological Jurisprudence’ <[www.britannica.com/.../sociological-jurisprudence/](http://www.britannica.com/.../sociological-jurisprudence/)> accessed on

<sup>64</sup> Spencer, H., ‘Sociology’ <[sociology-4-allblogspot.com/.../auguste-comte](http://sociology-4-allblogspot.com/.../auguste-comte)> accessed on 10-06-2016. See also Adaramola, *op.cit.*, 265.

<sup>65</sup> Comte, A., ‘Sociology as a Concept’ <[sociology-4-allblogspot.com/.../auguste-comte](http://sociology-4-allblogspot.com/.../auguste-comte)> accessed on 10-06-2016.

<sup>66</sup> *Ibid*

<sup>67</sup> Spencer, H., ‘Sociology’ <[sociology-4-allblogspot.com/.../auguste-comte](http://sociology-4-allblogspot.com/.../auguste-comte)> accessed on 10-06-2016. See also Adaramola, *op.cit.*, 265.

<sup>68</sup> Duguit, L., ‘The Sociological Principles’ <[www.academia.edu/.../duguits>sociology-4-allblogspot.com/.../auguste-comte](http://www.academia.edu/.../duguits>sociology-4-allblogspot.com/.../auguste-comte)> accessed on 10-06-2016.

<sup>69</sup> *Ibid*, See also Samba, *op.cit.*, 77-78.

valid, it must receive approval through mass of public opinion thus making expression of public opinion on social solidarity principle, the basis on which validity of laws should be judged.<sup>70</sup> This is the scale upon which performance of all arms of government in Nigeria and the basic Laws permitting their existence must be judged.

Indeed, what is common to philosophers in the sociological school is that they reject the formal and logical idea of law by the positivists on the ground that the formal law represents only a partial portrait of the law.<sup>71</sup> It is a philosophy adopted to looking at the society as a key to better understanding of law than had been the philosophical basis of natural law school and the positivists. It believes that law is not an absolute and static body of rules in itself but relative to time, place, and society, emphasizing the need to examine the interaction between law and society.<sup>72</sup> The object of sociological jurisprudence therefore is to work out a scientific process of determining the variables by which the society functions, with regards to law and vice versa. This is the direction that is lacking in the positivist philosophy that has been the bane of the Nigerian legal order over the years.

Therefore in the face of apparent failure of the present political structure in Nigeria, including total failure of the democratic system resulting from the mockery of the electoral process constituted by rigging and vote- buying, electoral violence and official fraud; party high-handedness that virtually create a one party system; high level corruption by Governors who sponsor violence to cow genuine opposition in the face of non-payment of salary with tacit connivance of central government that seems helpless in tackling social challenges, sustainability of the present legal order in Nigeria has justifiably been called to question.

According to Ehrlich, the law as contained in Statute books and Case Laws do not have the final say in social problems. Instead, he said the final words dwell in the “living law” which is the people’s values and sensibilities.<sup>73</sup> Although he conceded that there will always be a distinction between the norms of the formal law, the actual behaviour of the people, and the living law, he insisted that the task of the legislator is to keep abreast with the living law to ensure that the law at any time reflected the people’s notion, insisting that once a particular law began to suffer habitual disregard, it was obvious that it had lost its mandate as a living law.<sup>74</sup> This idea seems to have influenced the provision of the Nigerian Constitution providing that sovereignty rests with the people.<sup>75</sup> Whatever that provision means is difficult to fathom because of an earlier provision declaring supremacy in the Constitution itself but all the same, the fact that those in power must return to the people to renew their democratic mandate points to the idea of sovereignty resting with the people. But the question is whether, by current happening in Nigeria, power could be said to rest with the people or elitist Corrupt Political Class that return to the electorate only when it is time to renew their mandate, even if by a pre-arranged selective arrangement in a manner that would perpetuate tenure of cabal of an oligarchy.

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<sup>70</sup> Duguit, *op.cit.*, See also Samba, *op.cit.*, at 77-78.

<sup>71</sup> Ehrlich, E., ‘Review of Fundamental Principles of the Sociology of Law’ <[chicagobound.uchicago.edu/.../](http://chicagobound.uchicago.edu/.../)> accessed on 10-06-2016.

<sup>72</sup> *Ibid*, See also Freeman, *op.cit.*, at 426.

<sup>73</sup> Ehrlich, *Ibid*.

<sup>74</sup> *Ibid*

<sup>75</sup> The Constitution of the Federal Republic of Nigeria, 1999, Section 14(2)(a)

This is why the Nigerian legal system must be re-engineered towards sociological philosophy aimed at satisfying maximum wants instead of the present system geared towards protecting a few corrupt class. This is what Pound described as social engineering aimed at satisfying maximum wants with minimum friction. Incidentally, the bane of Pound's position like most sociological philosophers has been a tenacious hold to law as an instrument for resolving conflict of interests in the society, without providing the scale upon which such interests could be prioritized for amicable resolution. It is to close such gap that this paper imports the concept of bioethics as a measure for balancing competing interests, especially as between societal values and various Laws and policies in Nigeria.

The question is, what is bioethics? It is an aspect of ethics that explores ethical questions on how to take decisions about behaviour and policy questions that governments, organizations and communities must face when they consider how best to exercise preference in competing situations.<sup>76</sup> It seeks to figure out what should be done or the best course of action that should be adopted in some complex situations. The difference between ethical science and bioethics is that while the former seeks to know how to contain a particular situation but the later, bioethics is much more interested in the basis for the decision.<sup>77</sup> Obviously, bioethics is not as close-ended as the law thus explaining why something can be illegal and yet ethical although something can be unethical and yet, not illegal because while law sets standard, but ethics admonishes virtue.<sup>78</sup> This is why in ethics, the primary focus are, respect for persons, minimizing harm in the effort to maximize benefits and then, fairness.<sup>79</sup> This explains why ethical questions usually arise when individuals or group interests are under threat of harm, disrespect and unfair disadvantage; to identify all available options and considering implication of each option.

Bioethics requires that in taking any decision, the policy maker should consider how stake holders are affected physically, emotionally, and economically with the consciousness that the impact of a decision or policy could affect many more people and stakeholders than initially expected.<sup>80</sup> Such measure helps to check arbitrary option that may be counterproductive. This is why Bioethics insist that in weighing overall public interest against societal values in each situation, policy makers should prioritize interests of stake holders to justify basis for so doing. In doing this, they should take into consideration core-ethical indices like respect for others, minimizing and maximizing benefits and fairness in that order. Respect for persons here means not treating someone as a means to an end like sacrificing interest of one person for survival of a larger number, in utilitarian manner.<sup>81</sup>

Respect for persons here entails listening to persons with effort to understand what such persons stand for, without belittling or making jest of their ideas and yet, firm enough to demarcate between reality and sentiments. It is a measure by which the court could check impunity that has now become the bane of those in power in Nigeria today. It requires promoting positive consequences by balancing harms, burdens, and benefit to determine action that does the least harm and provide

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<sup>76</sup> Thean, K.S., 'What is Bioethics: Defining Ethics and Bioethics' <[mstrzel.eletel.p.lodz.pl/mstrzel/](http://mstrzel.eletel.p.lodz.pl/mstrzel/)> accessed on 25-05-2016

<sup>77</sup> *Ibid*

<sup>78</sup> *Ibid*

<sup>79</sup> *Ibid*

<sup>80</sup> Irvin, D.N., 'What is Bioethics?' <[uffl.org/vol10/irvin10.pdf](http://uffl.org/vol10/irvin10.pdf)> accessed on 25-05-2016

<sup>81</sup> *Ibid*

most benefits in the nature of distributive justice, resulting in social justice. It must be noted that fairness which is antithetical to the tenets of positivistic philosophy does not necessarily entail equality since the whole exercise may be determined by the need of each person or according to merits or contribution. But aside this are borderline situations where one needs to make a choice between two ethical situations like where one needs to show respect for an elder and where such elder has done something the society abhors. This is why a policy maker needs to balance the harm of choice against the benefits, instead of the option of core positivist philosophy.

Although introducing such concept with extraneous values towards the validation of law challenges core-positivist philosophy but recent jurisprudential trend seems to admit that a strong hold to positivist philosophy alone does not do any legal system any good, even when such scholars hardly go beyond such expression, to proffer how conflict between ideals of these philosophies can be resolved, if they are to functionally augment or complement one another.<sup>82</sup> Furthermore, it must be noted that although the concept of bioethics is medical-based but it is apparent that in recent years, various fields of social sciences, including law, have resorted to it as a measure for reconciling certain hard line principles of law to societal values as an option for ensuring proper course of justice in each situation<sup>83</sup> This is why bioethical questions have now moved from strictly medical issues to questions bordering on whether law should make “immoral” activities illegal where there is no victim; which bioethical choices should be limited by laws and how much weight legislators or courts should give bioethical arguments in passing or interpreting new laws<sup>84</sup> Indeed, in jurisdictions where bioethics is accommodated in the interpretation of laws, their case-laws have applied this concept to issues bordering on homosexuality, contract, custody of children, trademark and several other areas to prioritize conflicting interests and values against strict provisions of laws, as meet the justice of each case.<sup>85</sup>

In the Nigerian situation, bioethics could be explored as a support concept to sociological philosophy to make a choice between a conflicting core-value of the people and a particular law whose strict application only pave way for impunity by the privilege few and their cronies. This no doubt may amount to a shift from strictly positivist philosophy to a union between positivism, sociological ideals, and a blend of some utilitarian values, as meet the special circumstances of the Nigerian situation.

### **Summary, Conclusion and Recommendation**

This paper on Law and the Society in the 21<sup>st</sup> century explored the relevance of Sociological Jurisprudence in contemporary Nigeria. Tracing the historical back-ground of the interface between Natural Law and Positivist philosophies in Nigeria’s Legal Order, the paper took a position that in view of systemic failure of every aspect of the Nigerian body polity, it is imperative to look elsewhere in finding a more workable philosophy upon which the Nigerian Legal Order

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<sup>82</sup> Ogwo, B; ‘The Concept of Positivism: The Jurisprudential Antidote Against Natural Laws’ CJJIL, vol.4 No.1, 2011, 95

<sup>83</sup> Law and Bioethics Index; ‘Relationship between Law and Bioethics’ <[www.ahc.umn/img/.../bioethiclaws.pdf](http://www.ahc.umn/img/.../bioethiclaws.pdf)> accessed on 22-05-2016

<sup>84</sup> *Ibid*

<sup>85</sup> As was done in *Lawrence v Texas*, 539 U.S. 558 (2003); *In the Matter of Baby M.* 109 N.J. 396, 537 A.2d.227 (1988); *Johnson v Calvert* 5Cal. 4<sup>th</sup>84, 85, p.2d 776, 19 Cal. Rptr.2d 494 (1993); *Davis v Davis* 842.5.W.2s 588 (ten.1992) Cert. denied, 1135.it.1259(1993)

may be re-engineered. Thus, the paper canvassed that in Nigeria's dire situation, it is only by sociological philosophy that we can re-engineer the system in a manner as to put society in the center, in line with aspirations of the Preamble and sections 1 and 4 of the Nigerian Constitution which purport to vest ultimate power in the people. This is reflective of recent thoughts in jurisprudence the world over, which seem to be gravitating fast, towards sociological kind of legislation where the people's cultural values grossly determine the kind of legislation that is made in their special circumstance. It is for such reason this paper has shown that contemporary position of America and a lot of Europe on same-sex marriage and homosexuality can only be rationalized as sociological, having been influenced by the change in their social values. It is in the light of this, the paper expressed worry that while National laws of various countries, with all the paraphernalia of enforcement are tilting towards sociological philosophy, Nigeria, with ineffective enforcement machineries continues to hold strongly to stereo-typed political arrangement of a presidential system with a federal system that creates independence for corrupt administrators as *tin-gods* in their states who resort to all forms of intimidation to suppress any genuine opposition. This informed this paper's recommendation that Nigeria should resort, more towards Sociological Philosophy, supplemented by the concept of bioethics as the basis for a re-engineered phase of her Legal Order.