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The Sacrosanct Of The Realist Jurisprudential Standpoint

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Abstract

The study of jurisprudence is rooted in philosophy. It involves an examination of human wisdom as deposited in the minds of many great thinkers on a discreet analysis of societal problems, demands, and what should be the proper roles of the law in engendering a better society. In essence, since opinions in the minds vary, there could not be any convincing and all-embracing definition of jurisprudence. The natural law school posits that law represents the higher laws of an indeterminate sovereign by which man-made law itself must be filtered by the divine law to make it fit to guide against the misconduct of man, both the ruler and the ruled. On the other hand, the positivist legal theorist conceptualises law as the article that emanates from a human sovereign who derives his power from the people, to whom every person is subservient, but himself is subservient to no one. The realist position stresses the importance of the Court's decisions in determining what is, in a real sense, 'the law'. Jurisprudence conceptualised or defined as the wisdom of law is faced with the task of eliciting the wisdoms of the various schools that are faced with the herculean task of defining, and conceptualising what law is, what law ought to be, what are the essentials of legal validity, what is the source of real law in the most practical sense, and how do we get to the ideals of law, among other issues. Legal theorists agree that political powers should not be concentrated in one person or institution, but in collegiate bodies. There was agreement between legal and political theorists that the governmental powers in the state should be separated and manned by separate institutions. Baron de Montesquieu wrote about the theory of the separation of powers. By this theory, the law-making function should be performed by the legislature or the parliament, and the policy formulation and implementation roles should be within the exclusive preserve of the executive arms of government. Then, the law interpretation and adjudication functions should remain exclusively within the judicial domain. With this arrangement, the power to make law could only be performed by the legislative branch and not by any other branch. Meanwhile, the vexing question is how on earth the claim by the Realist could be valid, that nothing pretentious do I mean by the law more than what the Court states, putting it in Oliver Wendell Holmes' words. Again, if the Court itself is a product and creation of the law, on what ground could the judiciary be the progenitor of law? As a product of law, a judicial arm could not be its progenitor. This is contrary to the product of an indeterminate sovereign who is subservient to no one and to whom everybody is subservient. However, the judicial law-making function emanates from the adjudicating tasks of the Court in the course of resolution of disputes, clarification of ambiguities in law, and acting as a check on recalcitrant executives and the parliament, an exercise necessary to check or preventing the legislative arm from passing draconian law at the dictate of virulent executives with the abilities to pass law and implement same with all the violence of an oppressor. Through adjudication, clarification, and checks and balances on other arms of government, the law-making functions of the courts became more profound. Thus, the truism of the Realists takes hold. This paper aims to trace the origin of the realist school, its foundation, its typologies, its characteristics, and the relevance of the realist school in the Nigerian courts.

Keywords: Sacrosanct, Realist, Jurisprudential, Standpoint

This paper is a tremendous improvement in a Chapter of his Book*: Lecture Notes on Jurisprudence and Legal Theory*, Durrel Monex Publications, Nigeria.

1.0 Introduction

Before the emergence of the state, political theorists, especially the social contract theorists, posit that human beings were in a state of nature where confusion and anarchy reigned, and survival of the fittest was the order of the day[1]. Amid these confusions, human being seeking for orderliness in their domain had to submit power to the most powerful among men or the collegiate of the most powerful in a social contract that the ones to whom the power is submitted should give them peace and orderliness in return for their submission willingly, whilst the sovereign to whom power is submitted or the collegiate to whom power is submitted is subservient to no one. Later, political theorists believed that power should not be consolidated in a single sovereign, and there is a need to separate governmental power in the state, with separate institutions to superintend each of the compartments[2]. It is therefore in this regard that we authenticate the three institutions of government. These three institutions are the legislature that performs the law-making function, the executive arm in charge of policy formulation and implementation, and the judiciary that performs adjudicating and interpreting law functions. Jurisprudence emerged as the wisdom of the law to give the judicial arms the compass to navigate the complex terrain of law, and to provide the philosophical foundation upon which the Court should deliver a philosophically sound judgment in the light of truth. It is because of the ability of the Court to pronounce on the validity or otherwise of any legislative enactment that the realist school posits that whatever the court states is the law[3]. Further to this commitment, many schools of jurisprudential theorists have emerged to

[1] Stanford Encyclopedia of Philisophy, Legal Realism, the Retrieved from https://plato.stanford.edu
[2] *Ibid*
[3] *Ibid*

conceptualise the nature of law. One of these schools is the positivist theory that posits that law emanates from the sovereign. The question for the positivist legal theorists is: Where is the sovereign located? Realistically, in the parliament. But many parliamentarians are not law experts. The essence of the existence of the parliament is to ensure that whatever forms the law should spring from the people through their elected representatives, to wit, the parliament. In essence, to refine law, the Court must pronounce on the validity or otherwise of any law emanating from the parliament in performing its adjudication and interpretation function at the instance of any litigant. This function placed the Court ahead of the legislative arm of government. Hence, the emergence of the realist legal theorist and their postulation that what the Court states is the law.
Many definitions of the realist school have emerged from legal theorists[4]. Realism is not consolidated into a definite, coherent theoretical system, but, at best, it could be described as a movement or historical phenomenon rather than a school of thought. According to Roscoe Pound, *realism is the accurate recording of things as they are, as contrasted with things as imagined or wished to be or as one feels they ought to be*[5]. In Friedman's view, the Realist school prefers to evaluate every part of the law regarding its effect[6].

1.1 Origin and History of the Realist School
Legal realism is a school of legal philosophy generally associated with the culmination of the early twentieth century attack on the orthodox claims of late 19th century classical legal thought in the United States of America. This classical legal thought, conceptualism, formalism, or idealism, has the main characteristic of the assumption that "the rigid application of pre-existing legal rules could determine all cases. According to this understanding, the role of the judge was conceived to be one of pure deductive application of the relevant laws to the case before it[7].

1.2 Challenge to the Philosophical Standpoint of Idealism
Legal realism arose as a reaction to the above assertions that first, all cases could be determined by the rigid application of preexisting legal rules and second, that the role of the judge was to be conceived to be one of pure deduction of application of the relevant laws to the case before it which coalesced to a "closed system"[8]. In consequence, the Realist felt that:
a. This legal reasoning is defective,
b. in that in many cases, the existing legal rules are not definite enough, and
c. in many cases, the judges have a measure of discretion concerning their final decisions[9].

1.3 Radicalised Period
Legal realism entered the radicalised period when, later, some realist radicalised their positions by claiming that judges are in no way constrained by any rules to decide one way or the other, even though they give the impression that their decisions are the necessary consequences of the application of the existing legal regulations in their judgment. At this radicalised stage, they also believed that judges have a choice between possible alternative meanings of the words of a statute or between following or distinguishing between different lines of precedents[10].

1.4 Definitional Approach
The realist legal theory is a school of philosophy that emerged around the 20th century. Though very difficult to pin down to a specific definition, it is conceptualised as *'a perspective that legal rules are to benefit the larger society and that public policy is based on judicial decisions. In* the strict sense of the term, Realists defined law as *'the generalised prediction of what the court will do'*[11].

1.5 Challenging the Basic Scientific Standpoint of Idealism
The Realist school is a school of legal philosophy that challenged the fundamental scientific standpoint of legal formalism; since legal formalism characterises law as an autonomous system of rules and principles that courts can logically apply objectively to reach a determinate and apolitical judicial decision[12]. The conceptualism, formalism or idealism standpoints that legal realism objects could be listed here, in the positions of the theorists or perceptions about the concept of law[13]:
i. The legal positivist conceptualised law properly so-called as law made by human beings. The position that is presented in Austin's view is that law is the command of the sovereign. According to this contention, law was an autonomous and closed concept, taking no cognisance of other hallucinations about its component[14].
ii. Professor Hart, a part supporter of Austin, emphasised that a legal system properly so-called as constituted in a modern society was a marriage between primary and secondary rules. Therefore, this foreclosed the system, and no other law existed.

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[4] *Ibid*
[5] R. Pound (1931) 'The Call for a Realist Jurisprudence', Harvard Law Review, Volume 44, Number 5, Harvard Law Review Association.
[6] L.M. Friedman (1985) History of the American Law, 2nd Edition, New York, Simon & Schuster, Touchstone Books.
[7] 'American, Realist School of Jurisprudence' Retrieved from http://newindialae.blogspot.com. On the 7th day of April, 2023.
[8] Legal Realism, retrieved from Stanford Encyclopedia.
[9] *Ibid.*
[10] Ibid.
[11] *Ibid.*
[12] *Ibid.*
[13] *Ibid.*
[14] J. Austin (1977) Lectures on Jurisprudence, and the Philosophy of Positive Law, St. Clair Shores, MI: Scholarly Press: (1995) The Province of Jurisprudence Determined, Cambridge University Press.

iii. The Natural Law school posits that laws made by man are subservient to higher law emanating from God, and with this, the conceptualisation is also foreclosed.
iv. Ronald Dworkin, who criticised Hart, argued that law is a seamless web and that even in complex cases, the judge had to follow predetermined principles and, through interpretation, marry the past with the present or current issue, opting for the best alternative. This also demonstrated that Dworkin was an advocate of an autonomous closed system[15].
v. Hans Kelsen's Pure Theory of Law also posits that higher norms validate lower norms. The norms have been predetermined and closed from our frolic sourcing, which also represents a closed system[16].

1.6 Inability of Legal Realism to Settle with Absurd Concepts

Below are legal concepts the Realist claims they could not be on the same page with, as outlined by the author of the Stanford Encyclopedia of Philosophy[17]:
i. All the above legal closed systems are theories that the Realist claimed to be absurd legal concepts. The Realist contended they could never be on the same page with these conspicuous absurdities.
ii. The Realist contends that law emanates from judges and, therefore, law is what the Court does. To this extent, therefore, judges are themselves lawmakers.
iii. They further posit that formalism underplays or chooses to ignore the judicial law-making abilities.
iv. Realists also attacked the conceptual foundation of the positivist legal theory and the natural law theory.
v. Furthermore, legal Realist posits that though there may be rules that constrain judges, judges still exercise wider discretionary power, thereby making decisions according to what they think following the circumstances of each case under consideration.

2.0 The Basic Standpoints or Characteristic Features of Legal Realism

The basic standpoints or some features of legal realism as outlined by the authors of the Stanford Encyclopedia[18], Karl Llewellyn[19], and Prof. Goodhart[20] are illuminated with additional details and case laws below:
i. **Realists' views Law as Rigorous Doctrinal Science:** Legal realism represents the understanding that law is an autonomous, comprehensive and rigorously structured doctrinal science. It is an internally valid, autonomous and self-justifying science in which the correct answers are derived from the system. The implication of this proposition for legal realism is that for any statutory provision, when applicable to different factual scenarios of cases before a judge, the correct answer and interpretation are innate within the judge himself, being a reservoir and master of the knowledge of law in that regard. Although lawyers who are foremost officers of the Court might greatly assist the Court, their addresses are mere suggestions, and it is for the judge to give the correct answer. Thus, the Court remains an amazing laboratory of immense importance in manufacturing the law.
ii.
iii. They believe that Jurists could not be reduced to mere Technicians

Generally, for legal realism, law comprises rules and concepts that can provide the right answers to every case that might arise using syllogistic reasoning. For example, S.8 of the Criminal Code of Nigeria states that:
When two or more people form a common intention to prosecute an unlawful purpose, and another offence is committed of such a nature that such offence is the probable consequence of that common intention, all of them are guilty.

From the above statutory provision of the Criminal Code, applying syllogistic arguments, the following requirements could be deduced before the offence under S.8 could be committed:
i. There must be two or more people
ii. The two or more people must form a common intention
iii. The common intention must be to prosecute an unlawful purpose
iv. Another offence must be committed
v. The other offence committed must be the probable consequence of the initial common intention.

From the above, one could see that it is very easy to plug the factual situation of cases within the fundamental pigeon holes of the above requirements to arrive at a correct result. This kind of scenario prompts legal jurists within the conceptualism, formalism or idealist stronghold to conceive or reduce legal jurists into mere technicians whose task is purely mechanical. Ascribing such a role to judges implies that their primary task is strictly mechanical and restricted to:
i. Find the law
ii. Declare what it says, and
iii. Apply its preexisting prescriptions.

Essentially, from the above points of view, two features are essential to formalism.
i. Purported autonomy

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[15] R.M. Dworkin (1986) *Law's Empire,* Cambridge: Harvard University Press; W. Raymond (2014) Philosophy of Law: *A very Short Introduction*, Chapter 3, Dworkin: *The Moral Integrity of Law*, P. 49, Oxford University Press.
[16] H. Kelson (1967) *Pure Theory of Law,* Translation from the Second German Edition by Max Knight, Berkeley University of Carlifonia Press.
[17] Op. cit.
[18] *Ibid.*
[19] K.N. Llewellyn (1962) *Jurisprudence, Realism in Theory, and Practice*, Chicago: The University of Chicago Press.
[20] L. Goodhart (1931) *Essays in Jurisprudence, and the Common Law*, Cambridge University Press, New York.

ii. Closure of the legal world

However, legal realists posit that classifying new cases into these fundamental pigeon holes and deducing correct outcomes is not as easy as conceived by members of the idealist school. In essence, legal jurists can never be relegated to mere technicians whose task is purely mechanical. For example, in the Nigerian case of *Obafemi Awolowo v. Minister of Internal Affairs*[21], Chief Awolowo and other members of his party were charged with treasonable felony. Consequently, he engaged the services of a British Queen's Counsel and criminal law expert, Mr. E.F.N. Gratean, to lead his defence team. Mr. E.F.N. Gratean was deported immediately on landing at the Nigerian airport on the order signed by the Minister of Internal Affairs. Constitutionally, it was stipulated that an accused person has a right to be defended by counsel of his own choice. Hence, Chief Awolowo challenged this deportation order in the Court. The Nigerian Court per Justice Udo Udomah held that the constitutional stipulation that an accused person has a right to be defended by a counsel of his own choice only applied to counsel licensed to practice in Nigeria. Complex cases like the Awolowo v. Federal Electoral Commission (FEDECO), Njoven v. State, Royal British College of Nursing of the United Kingdom v. The Department of Health and Social Securitydemonstrate that judges are not mere technicians.

iii. Formalism Failed to Describe Real Adjudication

From the above, realists claimed that formalism or idealism failed to describe what obtains in real adjudication. First, in novel situations resulting from society being not static but dynamic, there is an avalanche of hiatuses, that is, uncovered areas in law by existing legislation. The apparent result is legislative inactivity and the fact that the judge, rather than a mere interpreter, entered the scene to fill the void areas by judicial legislation.

iv. The Evil of Real Adjudication

Formalism lacked knowledge of what real adjudication entails. For the legal Realists, formalism does not describe the essentials of real adjudication, some of which are:

i. The unsettled nature of legal authorities in real adjudication,
ii. The indeterminacy of the so-called settled legal doctrines
iii. The manipulability of formal techniques
iv. The law serves as a means for masking the normative choices of a few individuals; and
v. Fabricating professional authorities

The above are deceptive theories that the Realist considered they could never sit down with.

vi. The indeterminacy of Law and Doctrinal multiplicity

The Realist views legal doctrine as hopelessly indeterminate and that the multiplicity of concepts can never make law determinate. They posit that this indeterminacy opens the way for the manipulation of law to suit class interest, as Karl Marx posited. For example, the Nigerian case of *Fela Anikulapo Kuti v. The Attorney General of the Federation* is apposite[22]. In that case, one of Fela's boys was said to have attacked a soldier and caused the soldier's motorcycle to be set ablaze.[23] Fela and his Egypt 80's waxed a record titled "*zombie*" where he allegedly accused the military of being adherents of the superior order without thinking about the consequences and with strict compliance without minding the danger ahead. Irritated by soldiers, his maternal family home in Surulere, Lagos, where Fela resided, in addition to other valuable properties therein, was set ablaze by angry soldiers. In an action by Fela Anikulapo, the Court held that an unknown soldier did the act and therefore he was awarded zero damages. The case of the Ogoni nine in Nigeria, where nine Ogoni leaders led by Kenule Beason Saro-Wiwa were unjustly declared guilty by a military set-up tribunal and gruesomely murdered by the military, is also a clear revelation of the incidence of the manipulability of the legal system to suit class interest. In these scenarios, one could easily press that per adventure we have a neutral Constitutional Court of Appeal in Nigeria that could attend to any appeal from any court or tribunal, such evils might not go scot free to the extent of escaping the niceties of real adjudication in appellate jurisdiction as proposed by the realist school.

vii. Attempts at Finding the Genesis of Indeterminacy

After appreciating that law is uncertain or indeterminate, the Realist endeavours to discover the genesis of the indeterminacy of legal doctrines. They found the answer in the multiplicity of doctrinal sources that are potentially applicable. According to the Realist, rules and principles are part of the habit of hunting in pairs. At the same time, legal doctrine always offers at least two buttons. A choice must be made between the two doctrines, yet none of the doctrines' answers to the problems is pre-ordained. Precisely, none yield determinate results yet, and the meta-rules you can force a judge to prefer one are non-existent. For example, if John Bright owns one acre of land through which a stream passes, connecting Kelvin Daniel's land, and for John Bright, the stream is of no use to him, but for Kelvin Daniel, the stream serves as a veritable source of water for his poultry farm. John Bright might decide to block or channel the river to pass through another place other than his land, since he has a right to use his property legally. Kelvin Daniel might invoke the rule that nobody can infringe on the right of another in the process of exercising his own right; the underlying maxim is *Qui Jure Suo otitur, nemenem leadet.* Here we have two rights confronting each other and two rules or doctrines of law contending for applicability. Here, the non-availability of any mega rule to coerce the judge to pick neither of the two legal doctrines means that the judge must make a choice as an institution.

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[21] (1962) LL E p. 177

[22] (1985) 2 NWLR Pt. 6, p. 211, esp. 236-237.

[23] The New York Times of 20th February, 1977, page 3.

As per legal rule, no legal rule exists in solitude. Legal rules are always a part of the legal system. Looking at the legal system, we discovered the multiplicity of choices and rules. Notably, a choice has to be made between the competing rules.

viii. Realist Jurisprudence as the Opposite of Idealism

Realism jurisprudence is the opposite of idealism. It is a very complex movement, with many thinkers defending different positions. Essentially, to give a sufficient and unawed account of the realist school will be to engage in the discussions of all the authors. This would be a very clumsy and cumbersome exercise. In a nutshell, the Realists refused to attach enormous importance to laws enacted by the legislature but instead upheld judge-made law as genuine. They denounce traditional legal rules and concepts but concentrate on what the Court does in reaching its final decision in a particular case. Consequently, they define law as the generalised prediction of what the Court would do. To this extent, Oliver Wendell Holmes, from whom most Realists derived their inspiration, made a statement that, "*the generalised prediction of what the Court will do and nothing more pretentious is what I mean by the law*[24].

ix. Certainty of the Law is a Myth

First, the positivist legal theorists believed that to ensure the stability and predictability of law, the courts must follow well-established precedents. However, the Realist held contrary views that:

i. Certainty of the law is a myth, and
ii. The predictability of the law depends upon the set of facts presented before the courts for decision.

x. Law is intimately connected with society.

The Realist presupposes that law is intimately connected with society, but since society changes faster than law, the eventual result is that there can never be certainty in law. With the above mindset, the Realist does not support a formal, logical and conceptual approach to law, and they evaluate any part of law in terms of its effect.

ix. Filling the vacuum resulting from Legislative Inactivity. The tasks before the legislature are always enormous. Because of the overbearing nature of these tasks, many areas for legislative attention remain unattended, and as a result, the judiciary must step in to fill the gaps in law.

1.7 The Scandinavian Realism

The author of the Stanford Encyclopedia listed two types of realist movements that form the focus of attention below:[25] Scandinavian realism existed in Europe, Sweden, Norway, England and Scandinavian countries. Axel Hagerstrom, A.V. Landstedt and Karl Olivecrona supported the Scandinavian school of realism. However, the truth is that the Swedish philosopher, Axel Hagerstown and the Danish philosopher Alf Ross founded the Scandinavian jurisprudential movement known as Scandinavian realism.

The school was established first to destroy the distorting influence of metaphysics upon legal thinking and second, to provide a secure philosophical foundation for scientific knowledge of the law. Hagerstown's philosophical theory is committed to the metaphysical view that the world in time and space consists of causal regularities between things and events without any values, which is related to the epistemological view that what is, can be known by experience. Hagerstown's philosophy advances a naturalistic approach that conceives the positive law as a system of rules regarding behavioural regularities among human beings, and the naturalistic approach that legal knowledge is an empirical enquiry into the causal relationships between legal regulations and human behaviours.

Hagerstown's thesis uses information already known to guess what might happen regarding the ideas of rights and duties, which are odd propositions whose content is something of supernatural power concerning things and persons. For example, he wrote that taking a woman to the altar in a marriage with the words "with this ring I wedded thee" is like an incantation with supernatural force. In this sense, Hagerstown viewed law as a bond between the state and the people within it.

The second aspect of Hagerstown's thesis is that rights and duties have a psychological explanation in the feelings of strength and power associated with the conviction of possessing a right. Therefore, one fights better if one believes that one has a right on one's side. With due respect, in support of this, Hagerstown's philosophical standpoint, one could find reasons why people like the Late Gani Fawehinmi and Fela Anikulapo could die for a cause they knew as their rights, which the state had a corresponding duty to protect. Also, Omoyele Sowore's belief that he has the right to air his voice led him to confront the government's misrule with the slogan "revolution now", though his approach might be wrong.

Meanwhile, in Karl Olivecrona's view, the rule of law is an independent imperative and a proposition in imperative form, but not issuing like commands from a particular commander. He opined that the binding force of law is a reality merely as an idea in human minds. In essence, the law is conceived as an imaginary idea with citizens' corresponding actions perceiving it as a model for actual conduct in real-life situations. He therefore observed that the rule of law is not a command in the proper sense, and if they are command at all, they are natural fact. This is because the state, as an organisation, cannot issue a command like an individual can. Hence, the rules of law are independent imperatives as they are propositions that function independently of any person who commands them.

1.8 American Realism

This realist thinking was introduced to American jurisprudence by Oliver Wendell Holmes. Oliver Wendell Holmes has been described as the intellectual inspiration and the spiritual father of the American realist movement. Holmes was sceptical of the

[24] O.W. Holmes (1897) 'The Path of the Law', 10 Harvard Law Review.
[25] Op. cit

ability of general rules to provide the necessary solution to a particular case and readily gave credence to the role of extra-legal factors in judicial decision making[26].

Appreciably, Holmes gave life to realism by providing the first and classic exposition of the court-focused approach in 1897 in a paper called "*The Path of the Law*"[27]. The realist movement, therefore, began in the 19th century in America and gained force during the administration of President Franklin Roosevelt. The realist movement in the United States of America represents the latest branch of sociological jurisprudence, which concentrates on the decisions of the law courts. Realism is thus the antithesis of idealism. Finally, American realism is therefore a combination of analytical positivism and a sociological approach.

2.0 The American Realist School and other Schools of Jurisprudence

i. American realism and legal positivism

Though there are profound differences between legal positivism and American realism, both schools of thought, especially soft positivism, have one belief in common. This is because their views are similar in the difference between "law as it is" and "law as it ought to be". According to Hart, positivists look to the established primary and secondary rules of recognition that designate law-making bodies. American realists are sceptical about the degree to which rules represent the law. They seek to investigate how courts reach their decisions concerning what "law ought to be". As Karl Llewellyn observed, "the realist separation of 'is' and 'ought' is to be a temporary divorce. The divorce lasts, where scholars are discovering what courts do[28].

ii. American realism and sociological approach

Realists differ from the sociological school in that, unlike the sociological school, realists are not much concerned about the ends of law, but their main attention is on a scientific observation of law and its actual functioning. Against this background, some authorities have called the realist school the "left wing of the functioning school". In some quarters, there is the feeling that the realist movement in the United States should not be treated as a new independent school of jurisprudence, but rather, a new methodology to be adopted by the sociological school.

iii. American realism and natural law philosophy

Realist school differs from natural law school in that, according to the natural law philosophy, laws are made by nature or God. The realist school believes that judges or juristic persons make laws. Natural law is discovered by humans through the use of reason and choosing between good and evil. According to the natural law school, laws are based on the rules of morality and ethics.

3.0 Criticisms against the American Realist School

The American realist approach to jurisprudence has evoked criticisms from many quarters. Below are some of the criticisms[29]:

i. The critics alleged that the exponent of this realist school has entirely overlooked the importance of rules and legal principles and treated law as an assemblage of unconnected court decisions. Their perception of law rests upon the subjective fantasies and life experience of the judge deciding the case or dispute. Therefore, based on this subjective decision, there can be no certainty or definitiveness about the law. According to the critic, this is indeed overestimating the role of judges in formulating the laws. They believed that judges undoubtedly contribute to law-making to a certain extent, but it cannot be forgotten that their primary function is to interpret the law.

ii. Another criticism is that the Realist seems to have neglected that part of the law which never comes before the Court. Therefore, thinking that law evolves and develops only through court decisions is erroneous. A significant part of the law enacted by the legislature never comes before the Court.

iii. The supporters of the realist theory undermine the role and the authority of precedents and argue that case law is often made "in haste" without regard to broader implications. The courts generally make decisions on the spot and rarely take time for other considerations. They have to rely on evidence and the argument presented in Court. They cannot access wider evidence such as statistical data, economic forecasts, public opinion and surveys, etc.

iv. Critics further state that the realist school has exaggerated the role of human factors in judicial decisions. It is not correct to say that judicial pronouncements are the outcome of the personality and behaviour of judges. Various other factors must be considered while making a decision.

v. Finally, the critic further states that the American realist theory is confined to the local judicial setting of the United States and has no universal application in other parts of the world, like other schools of jurisprudence.

3.1 The Sacrosanct of the Realist Jurisprudential Standpoint

Many branches of law attest that judicial interventions profoundly influence the development of law and many legal principles.

i. The Realist School within the realm of the law of tort.
ii. The Realist School within the realm of the law of contracts.
iii. The Realist School within the realm of land law in Nigeria.
iv. The fact that the law hunts in pairs.

3.2 The Realist School in the Realm of Commercial Law, Company Law and the Law of Contract

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[26] H.W. Holmes, op.cit.
[27] *Ibid.*
[28] K.N. Llewellyn, op.cit
[29] American Realist School of Jurisprudence, retrieved from https:newindialaw.blogspot.com on the 7th day of April, 2023.

3.2.1 The Realist School and Law of Contract

The profundity of the realist school is manifest in the realms of commercial law, company law, and the law of contract. The principle of estoppel and all its variants today, apart from being a rule of evidence, have all their variants that originate from the courts' decisions. Lord Denning adroitly combined the principle of estoppel with promise to formulate the doctrine of promissory estoppel in the cases of Central London Property Trust v. *High Trees House Ltd*[30] and the case of *Combe v. Combe*[31]. In the case of *Central London Property Trust Ltd v. High Trees House Ltd*[32], his Lordship enforces a promise by the promissor/lessor to have the rental value of its leased properties reduced by 50%—a promise, though made in a war situation, which he intended to refrain from fulfilling. In *Combe v. Combe*[33], the legendary Lord Denning refused to elongate the rule to avoid annihilating the vital principle of consideration, a crucial element in enforcing contractual relations.

Another area of the pervasive influence of the realist position about what the court states is the law found its relevance in the rule in *Adams v. Lindsell*[34], which is the postal acceptance rule. The postal acceptance rule is that a contract entered through postal communication or correspondence is concluded when the offeree posts his letter of acceptance, rather than when the offeror receives the letter of acceptance. The rule was formulated when there was always a delay in communication. However, with the 21st-century emergence of electronic communication, there is a need for a judicial restatement of the law to distinguish between instantaneous and non-instantaneous means of communication. E-mail delivery and acceptance could be instant with a mere click. Electronic mail could be seen as an instant digital necessity of the postal system to reduce the bottleneck of late delivery in the communication of acceptance through the post office, which forms the rationale for the judicial legislation known as the rule in *Adams v. Lindsell*[35].

3.2.2 The Realist School and Company Law

The Court also in the realm of Company Law, through many rules out of which could be cited the rule in *Royal British Bank v. Turquad*[36], through which the Court used the doctrine of indoor management to stop the injustices the company when it enters a contract in an unauthorised manner with a third party contrary to the Memorandum and Article of Association, and intends to deny the contract by using the ultra-vires rule and the rule of constructive notice to shy away from liability. Here, the Court laid down the principle that: 'people transacting with companies are entitled to assume that internal company rules are complied with by the companies, even if they are not. This is the law to date in the common law world.

3.2.3 The Realist School and the Law of Tort

The Realist position is profound in virtually all areas of the Law of Torts. For example, in the tort of negligence, a wrong that occurs where a person owes another a duty of care, the breach of which results in damages to another, by previous precedents, there could be no duty of care unless there existed a contract between the parties. This was the position in the case of *Mullen v. AG Bar. & CO Ltd*[37], where the Court ruled against the claimant that there needed to be a contractual relationship between the claimant and the manufacturers. The Court made a significant U-turn and established the duty of care as a formidable factor for liability in the tort of negligence case of *Donoghue v. Stevenson*[38]. In the case, May Donoghue went to Well Meadow Café at Paisley with her friend, ordering a Scotsman ice-cream made of ice cream and ginger beer. This was served to them by the owner of the café, who brought a tumbler of ice cream and ginger beer and poured some ginger beer into the ice cream from a bottle labelled with the manufacturer's name, David Stevenson.

Meanwhile, a decomposed snail floated out of the bottle when Donoghue's friend poured the remaining ginger beer into the tumbler. Donoghue claimed that the sight of the decomposed snail was so disgusting and made her sick, causing her abdominal pain. Her doctor later diagnosed her with gastroenteritis and shock. A writ was subsequently issued against David Stevenson, the manufacturer of ginger beer. The question for determination before the Court was whether or not Stevenson owed Donoghue a duty of care in the absence of a contractual relationship. The House of Lords decided in favour of Donoghue. In that case, Lord Atkin formulates the neighbour principle to demolish the influence of the doctrine of privity of contract as a liability destroyer in the determination of liability under the tort of negligence, thus:

The case was critical because of the decision's importance to public health. To his Lordship, the moral rule that requires one to love their neighbour, in law, manifests as the rule that one has to take care not to injure their neighbour. His Lordship further states that care must be taken, and such care must be reasonable, to avoid putting one's neighbour in danger of foreseeable injury. He defined a neighbour as one who will be directly affected by one's action or omission so much that one has to put such a person under contemplation where he does such an action or makes such omission.

3.2.4 The Realist School and the Application of the Maxim, Qui Jure Suo Utitur, Neminem Laedit

The maxim Qui jure suo utitur, neminem laedit mean that you cannot, in the process of protecting your rights, infringe or encroach on the rights of others. This principle establishes the fact that legal principles hunt in pairs. The implication is that

[30] (1947) KB p. 130; 1 All ER p. 256.
[31] (1951) 2 KB p. 215.
[32] *Supra*
[33] *Supra*
[34] (1818) 1 B & Ald o, 681.
[35] *Supra*
[36] (1856) 6 E & B P, 327.
[37] (1929) SC p. 461.
[38] (1932) AC p. 562

there are situations when legal tussles could arise around protecting the rights or properties of the litigant, and safeguarding the infringement on the rights of others by the one who is asserting their right. In determining who is just between the opposing legal principles of protection of right and preventing the infringement of the right of another, it is incumbent on the Court to adjudicate the matter. In this circumstance, the Court must state the law, and the canon of resolution is embedded in the maxim that: you cannot, in the process of protecting your right, infringe on the right of another. For example, I am free to operate and do all sorts of Lawful activities within my yard, but these activities must not expose others to danger. Meanwhile, if I decided to put a poultry firm inside my compound, I would not expose neighbours to nauseating smells. In the Nigeria case of *Abiola v. Ijeoma*[39], the Court observed that: 'the main object of living in a house is to have a room with a bed in it where one can sleep in peace…..it seems to me that noise made by the chickens at these hours of the night is worse than a triviality.

3.2.5 The Realist School and Law of Agency

Insofar as that agent is acting in the course of the employment of the principal, the principal is vicariously responsible for the acts of the agent under the maxim Qui facit per alium, facit per se, meaning, he who does an act through another does it himself. In essence, an agent who is in the course of his employment of protecting the property and the life of the principal infringes on the right of another involve his principal in liability. This is the innuendo that could be drawn from the Nigerian Court of Appeal decision in the case of *Fidelity Bank PLC v. James Olanrewaju & Ors*[40]. In this case, Fidelity Bank of Nigeria PLC, Alaba Branch in Lagos, as 1st respondent, sought the protection of a mobile police for the safety and security of its property, staff and customers at the bank's premises. In the course of this duty, the Mobile Police assaulted the applicant by exposing him to a severe beating. The applicant applied to the Court under the Fundamental Human Rights Proceedings, seeking inter alia three million naira damages for infringing upon his human dignity. Judgment was delivered in favour of the applicant. It was pleaded on behalf of the bank at the trial that the bank could not be held liable for the Act of the Police, as it was not the principal. The Court of Appeal held that the bank was vicariously liable for the Act of the Mobile Police it engages for its service, which infringes on the rights of another.

4.0 The Realist School and Some Decisions of the Nigerian Courts

To stress the realist position that law implies what the Court states, some cases emanating from the Nigerian Court were revisited, showing that in the course of adjudicating, resolution of ambiguities, and in the course of exercising its power of checks and balances, what the law courts states might on many occasions represents the law.

First, in the case of *Awolowo v. Minister of International Affairs*[41], Chief Obafemi Awolowo, the leader of the defunct Action Group party, was arrested and charged with treasonable felony with other party members. He sought the service of Mr. E.F.N. Gratean, a Queen's Counsel and an expert in criminal law, to lead his defense team. When Mr. E.F.N. Gratean landed in Nigeria, he was deported under a deportation order issued by the Minister of Internal Affairs. Meanwhile, under the Constitution, it is part of the fundamental right that an accused could hire a lawyer in his defense.

In the course of interpretation of the law that an accused shall be entitled to be represented by a counsel of his own choice, Justice Udo Udoma, in what seems to be the law-making function of the Court, added a rider that 'such counsel must be one licensed to practice as a lawyer in Nigeria.

Also, the decision of the Supreme Court of Nigeria in *Rotimi Amaechi v. INEC and Others*[42], the claim that law represents exactly what the court states came to the fore. In that case, Rotimi Amaechi took part in the PDP primaries, where he emerged as the winner of that primary Election. However, instead of submitting his name as the gubernatorial candidate of the People's Democratic Party in that Election, the PDP Stalwarts submitted the name of Omehia as the gubernatorial candidate. The Election took place, and the PDP won. Meanwhile, within the interregnum, Amaechi approached the Court, claiming inter alia, that the PDP fails to give the reason for substituting his name as required by the mandatory provision of S.34 (L) of the Electoral Act. The Federal High Court upheld the substitution of Amaechi, who appealed in dissatisfaction. While the matter was in the Court of Appeal, the PDP expelled Amaechi from the party and canvassed the argument that the Court of Appeal lacked jurisdiction to hear the Appeal. The Appeal was therefore struck out. Dissatisfied with the Court of Appeal's decision, Amaechi approached the Supreme Court, and the question before the Court was whether a candidate who did not participate in a Gubernatorial election could be declared the winner of that Election. The Supreme Court declared Amaechi the winner, even though Omehia's name was submitted to INEC, and the PDP contested the Election in his name. In declaring Amaechi as the winner of that Election, which carries the innuendo that a vote is a vote for the party rather than the candidates, Oguntade JSC States that[43];

'*Am I now to say that although Amaechi has won his case, he should go empty-handed because the Election was conducted in the office? That is not the way of the Court. A court must avoid submitting itself to the constraining bind of technicalities. It is futile to merely declare that it was Amaechi and not Omehia who was then the candidate of the PDP. What benefit will such a declaration confer on Amaechi?*

The point is that the Court would not allow its decision to be in vain. But then, the legislature had amended the Electoral Act, 2010, to change this position of law. It is essential to state further that under the Judicature Act, 1903, the Supreme Court of Nigeria is both a court of law and equity. This implies that in the administration of law, the Court can invoke its equitable jurisdiction to save a particular situation in pursuit of substantial justice. However, this depends on the jurisprudential thinking

[39] (1970) All NLR 569
[40] CA/L/976/205.
[41] *Supra*
[42] (2008) 5 NWLR (Pt. 1080) p. 227.
[43] *Supra*

of the courts, either of the natural law school or the positivist-oriented school. In the case of *Savannah Bank of Nigeria Ltd v. Ajilo*[44], Ajilo took a loan facility from Savannah Bank of Nigeria Ltd using his property as collateral security. Ajilo defaulted in paying back the loan, and the bank decided to sell his property.

Meanwhile, the mortgage deed between Savannah Bank of Nigeria Ltd and Ajilo was without the requisite Governor's consent. The Land Use Act stipulates that any transaction without the requisite Governor's consent is null and void. This remains the position of law, by statute. In this case, Ajilo invoked the consent provision to protect his property and argued before the Court that since the mortgage deed was without the Governor's consent as required by the Land Use Act, the transaction is void and anything done under it could not stand. Meanwhile, in this case, we found two legal principles hunting in pairs; one being that *ex-dolo malo, non oritor actio*, that is out of an illegal transaction, no action lies which implies that going by the absence of Governor's consent, the bank had put something on nothing and should not expect it to stay. The second legal principle emanating from the exercise of equitable jurisdiction was under the rule in Walsh v. Lonsdale, where an instrument, a deed, or transaction does not conform with the required formalities, it is only inchoate, but binding in conscience between parties to it.

Oscillating between these two principles, the Supreme Court of Nigeria opted for the first and declared the transaction illegal. By implication, when legal principles hunt in pairs, it is incumbent on the Court to state the position of the law. The Supreme Court refused to invoke its equitable jurisdiction to protect the transaction. The Supreme Court, though, goes positivist but gives the impression that the law remains *ignorantia jus, non excusant*, meaning ignorance of the law is no excuse, remains the law.

CONCLUSION

Finally, one could sum up the realist position in the words of Jerome Frank, who stated that[45]: *Law is what the Court has decided with respect to any particular set of facts; before such a decision, the opinion of lawyers is only a guess as to what the Court will decide. This cannot be treated as law unless the Court decides by its judicial pronouncement.*

Despite the above, it must be stated that this is not to state that the parliament makes no impact on the emergence of new laws, some of which might not even be passed through the courts. Still, the importance of the law courts cannot be ruled out in the emergence of many laws relating to many subject areas of the laws of Contracts, Company Law, Law of Commercial Transactions, Law of Torts and many more, which are of judicial creation. The law Courts keep on informing the parliament on the creation of new rules, one example out of many is the exemptions to the Corporate Personality Principle, otherwise known as the rule in the case of *Salomon v. Salomon*[46].

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[44] (1989) NWLR (pt. 97) p. 305

[45] Jerome Frank (1932) 'What Court DO in Fact' 22 illinois Law Review, p. 645.

[46] *Salomon v. Salomon* (1897) AC 22. The exceptions to the rule were created by the Courts that the veil of incorporation could be pierced in certain cases of fraud and misuse, when the company is acting as agents for its shareholders that the shareholders might be held liable for acts of the company, evation of legal obligations etc.