

RECONSTRUCTING AMERICAN LEGAL REALISM LOGICALLY

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ABSTRACT

We are concerned in this paper to establish the rationality of American legal realism by adopting a theory of reconstruction. American realism is plagued with dichotomies in relating theory and practice; and the need to broach these dichotomies involves transcendence of experience and transference of consciousness. In doing this, we have both to excavate and to justify its philosophy, logic and science. American legal realism has its root in the philosophy of pragmatism and a logic that sets out the essential elements associated with the making and determination of the law through instrumentality of the court. The validity of this category of legal theory tends to lie on the extent of immediate use to which law can be put or the benefits it can afford the American society. Believing in the possibility of a realistic theory of law that is purely American precludes belief in universal understanding of human legal experience distinct from the understanding gained through the cultural lenses of the American people. Although American realists differ remarkably even within a single paradigm, nevertheless three areas of logical unity among them are that: They bear a cross relevance, a complementing and interlocking of results, and a similar faith in attacking legal problems. A completely empirical understanding of American legal realism seems nebulous, because causality presupposes the interaction of American liberal and legalistic political attitudes. Legalism is the life wire of American culture and this makes distribution of rights and legal predictability possible: incidentally language is an important instrument for making this happens. Countries seeking to adopt the American model of legal order or something similar to it should be capable of an equivalent orientation in terms of formulating their philosophy, logic and science of adjudication.

Keywords: American legal realism, legal realism, Pragmatism.

INTRODUCTION

In order to understand American legal realism, one has to study pragmatism and the rhetoric of American culture as a reflection of the moral, aesthetic, social and political life of the American world. A discourse on modern trends in American legal realism would not be complete without some reflection on the influence of colonialism on that theory together with the intellectual forces of that age such as historicism, romanticism and utilitarianism. Prior to 1776, law in the territory now called United States of America (USA) was instituted by European powers who introduced British common law principles into the legal system of that society. The arrival of the declaration of independence signaled a new beginning in American law with a shift from parliamentary to presidential legal and political order to chart a peculiar course of life for the people. Although colonialism marked the genesis of American legal history, it nevertheless would seem a little more realistic to associate the way American courts decide cases today with her post independence developments in the judicial process.

In all legal systems, realists try to show a sensible and practical idea of what can be done or achieved with law, thus they are prepared to deal with a situation as it is without pretending it is different. However, anti-realists deny the reality of independent existence of things, so that the operation of American legal realism generally engenders some conflicts as to dichotomies between experience and reason, thought and action, theory and practice, value and fact, interest and law. From all indications, American realists do not seem to constitute a particular school of law; rather they all tend to be seen as sceptics. They differ on seeing law in normative terms as an order regulating human conduct in a society and it follows by their approach that law is not a system of rules as conceived by American sociologists. The realists therefore indicate a problem with the normative approaches to analysis of law, because they do not clearly distinguish between the work of legislation and that of adjudication. We want to show in this paper that, as a rational activity, American legal realism is predicated upon a philosophy, logic and science that aim at uniting law and life in an efficiently and effectively organised socio-political system in which equality and justice prevail. Be this as it may, we will agree that some tenets of American legal realism belong to the teachings of realism generally while some of its tenets are peculiar to the American situation. We want to argue that here philosophy is a comprehensive way of life; and that for the Americans, this way of life resides in pragmatism. We will also try to show that the logic of American law is a body of knowledge systematically distilled from the adjudicative process based on the culture of the

American people. It is also necessary to show that the scientific study of American legal realism reflects the analytic process on the basis of which its reconstruction is posited. It is on this edifice that legal knowledge is grounded in American law, and the thrust of this law is its dependence on practical functions in the society, one which is capable of explanation in terms of “judicial behaviourism” (the customary or patterned behaviour of judicial officers) that serves to make law predictable. However, since thinkers are critical about the justification of American legal realism for lack of homogeneity in all its camps and ideas, one may question the possibility of a valid logic for American legal realism. We therefore want to show that the attempt to reconstruct American legal realism lies in the desire to broach various dichotomies that argue against its justification as well as eclecticify the essential tenets of the old and new systems of the theory. The overall intention is to provide a holistic understanding of how American law works in terms of meaning, nature, and knowledge culled from its effect on society. The outcome of this enterprise will serve as the science of American law. In what follows, we shall deal with the philosophy of American law.

THE PHILOSOPHY OF AMERICAN LEGAL REALISM

The philosophy that shapes the logic and science of American legal realism is “pragmatism”, which incidentally happens to be regarded as American traditional philosophy. The traditional view of pragmatism is given by Simon Blackburn, who appears to have combined its theoretical and practical perspectives into a holistic approach to knowledge. Blackburn (297) describes pragmatism as philosophy of meaning and truth with the assumption that the practical value of a belief or theory lies in its meaning and truth. In popular parlance, “pragmatism” is associated with the practical; and this is seen as complementing the theoretical. This implies that pragmatism is the philosophy of unity of thought and action. The goal of philosophy, according to pragmatism, is that it ends in a conclusion which when they are referred back to ordinary life experiences and their predicament renders them more significant, luminous and make our dealings with them more fruitful. We can see that the doctrine proposed by Immanuel Kant on the primacy of practical over pure reason plays an important role in the theory of meaning and truth. Kant (17-21) sees pure reason as reason unmixed with anything empirical or practical, while practical reason is most generally any reasoning aiming at a conclusion concerning what to do. Accordingly, very little of what is due to pure reason is devoted to common sense and human action. To be pragmatic is to be practical or to be concerned with doing things. In another dimension, Udo Etuk refers to pragmatism as philosophy of action. The reason, according to Etuk (55), is that pragmatism is a method of

logic for solving intellectual problems. In terms of methodology we will agree that while different schools have frequently claimed that there is only one correct approach to philosophical problems, the march of history has not seen any emerging consensus. V. C. Morris and Y. Pa are concerned with pragmatism in its growth and advancement through history. Morris and Pa (43) see pragmatism as a scientific philosophy of experimentalism and thereby link it with instrumentalism. It should be noted that experimentalism is concerned with controlled manipulation of events to produce observation that confirms or disconfirms a belief or claim, whereas instrumentalism is the view that a scientific theory is to be regarded as an instrument for prediction and new techniques for controlling events but not itself capable of literal truth or falsity. Interestingly, experimentalism and instrumentalism are alike in being doctrines of prediction, whereas the distinction between them is marked by their stages of development. Of course, we may argue that instrumentalism is the developed form of experimentalism.

William F. Lawhead and Robert Audi describe pragmatism in terms of the relation between experience and reason. While Lawhead (460) describes pragmatism as the principle of uniting thought and action, Audi (638) refers to it as a philosophy that stresses the relation of theory to praxis and takes the continuity of experience and nature as revealed through the outcome of directed action as the starting point for reflection. Audi argues that knowledge in this case is guided by interests or values. The assumption here is that since the reality of objects cannot be known prior to experience, truth claims can be justified only as the fulfillment of conditions that are experimentally determined.

The founding fathers of pragmatism are Charles Sanders Peirce (1839 – 1914), William James (1842 – 1910) and John Dewey (1895 – 1952) all these men being Americans. Together, these thinkers stress an emphasis on what works in experience rather than on empty theories. In order to ascertain this belief, Peirce sets forth the pragmatic maxim as follows:

In order to ascertain the meaning of an intellectual conception we should consider what practical consequences might conceivably result by necessity from the truth of that conception; and the sum of these consequences will constitute the entire meaning of the conception (481).

What Peirce says here is captured by the view that the meaning of a proposition or intellectual conception is determined by practical consequences, which thus serves as the third criterion of the maxim. We are concerned with pragmatism in the attempt to solve intellectual problems. Thus we may say that what it takes for a proposition (or theory) to be regarded as working is not its

correspondence with fact by way of reflecting experience, nor is it the coherence of propositions in terms of one proposition fitting into a set of other propositions, nor is it linguistic in the sense of what is the case. It must show “a practical way of thinking or dealing with problems that emphasises results and solutions” (Rundell 1162), which is why it is brought to bear on propositions as having practical rather than theoretical values. Explaining the pragmatic statuses of such a proposition or theory, Godfrey Ozumba writes:

The pragmatic theory of truth holds that it is what works in practice that is true. What does not work is not true. Truth is tested through consequences of ideas or statements whether they are beneficial or adverse to human well being. Pragmatism is a kind of humanism (77).

We may deduce from this view that pragmatism is fact oriented and observation based; and the central themes that set the pace for justifying the workability of pragmatism are truth, cash value and instrumentalism. To speak of truth is to speak of the workability of a belief or theory, which is why Ozumba (77) describes the pragmatic theory of truth as holding that it is what works in practice that is true. The ideal of cash value is located in the immediate use to which a belief or theory is put or the benefit it is supposed to yield. Instrumentalism thrives on the capacity of experience to make prediction. This is to say that instrumentalism is performed as action in the course of the interaction between a biological organism and its environment.

The importance of pragmatism to American legal experience may be discerned historically. Michael David Alan Freeman gives a brief historical account of American legal realism and its connection with pragmatism. Freeman (799-800) links American legal realism with the creed of *laissez faire*, a practice believed to have defined the dominant creed in America of the 19th and early 20th centuries. The creed was associated in the intellectual sphere with Romanticism, a feature marked by a reverence for the role of logic, mathematics, *a priori* reasoning as applied to philosophy, economics and jurisprudence. It showed little urge to link these disciplines empirically to the facts of life in spite of the increasing dominance of the American society by empirical science and technology. The consequence of that intellectual development was to treat philosophy, social science, and even logic as empirical studies not rooted in abstract “formalism” - “the view that mathematics concerns manipulations of symbols according to prescribed structural rules” (Audi 273). Freeman maintains that James and Dewey spearheaded the movement in the area of philosophy and logic; Thorstein and Veblen took the area of economics; Beard and Robinson took up historical studies, while Holmes faced the province of jurisprudence. While writing about the impact of the Romantic Movement on European and American

cultures between 1775 and 1830, Blackburn (332) maintains that it was partly a reaction against the stiff rationality of the Enlightenment and its official, static, neo-classical art in favour of the spontaneous, the unfettered, the subjective, the imaginative and emotional, as well as the inspirational and heroic. The Romantic Movement seemed to have been essentially hostile to the so-called British empiricism derived from David Hume (1711-76) and to which great thinkers like Jeremy Bentham (1748-1832), John Austin (1911-60) and John Stuart Mill (1806-73) showed adherence. Though these men were positivists and therefore anti-metaphysical, they were not regarded by the anti-formalists as being empirical enough because they were associated with *a priori* reasoning which was not based on actual study of facts (as we can see in Mill's formal logic and Bentham's hedonic calculus). Romanticism was especially critical of the historical approach of English utilitarianism. But unlike the sociological thinking of Roscoe Pound's persuasion which looked like Bentham's utilitarian thinking, it was adaptable to abstract analysis of society as visible in the doctrine of the end and purpose of law on the basis of which Pound (721-723) describes law as a means of controlling conflicting human interests. A careful study of the foregoing analysis indicates that those writers were concerned with pragmatism, because of the need to enlarge knowledge empirically and to relate it to solving practical problems in their society. Their attitude reflected a situation in which truth was linked with practical success in solving intellectual problems. For Dewey (35), knowledge was a kind of experience based on human actions and attainable with the solution of a problem. Incidentally, such knowledge was made possible through instrumentalism.

Freeman (799) explains Veblen's emphasis on the need for empirical study of institutions, especially the connection between economic institutions and other aspects of culture, adding that the new historians stressed the economic forces in social life. While stressing the contributions of these thinkers, Freeman writes:

The new historians stressed the economic forces in social life and the need to study history as a pragmatic means of controlling man's future. All of these currents of thought played a vital role in the gradual movement of the United States from a highly individualist to a form of collective society, in the first half of the twentieth century (800).

From the view credited to the new historian, it is clear that philosophy is a way of life and can further be described as a way to live by and perhaps die for. Since for the Americans this way of life is pragmatism, it qualifies as philosophy for a world of practical people.

American legal realism is rooted in the philosophy of a changing but stable world. This explains the cultural dynamics of American law in terms of the roles played by the institutions of legislation, adjudication, and administration of justice. It might be argued that American realism was influenced by the introduction of philosophical pragmatism. However, with the decline of realism in the 20th century, philosophical pragmatism has re-echoed in the work of Richard Posner as pragmatism in law, its interest being to show pragmatism as a disposition to ground policy judgement on facts and consequences rather than on conceptualism and generalities. Posner (11) maintains that to be pragmatic is to be instrumental, forward looking, empirical, sceptical, and anti-dogmatic. It is Posner's belief that one can subscribe both to pragmatism and to espousing an economic analysis of law; and for him, economics is the instrumental science par excellence. Posner's attitude to law and pragmatism can be seen as an attempt to extend legal realism rather than annul it, since his primary intention has been to fill the gaps left unfilled by the realists.

However, the search for greater certainty in American legal practice has led to two other levels of theorising among American realists based on recommendations for legal education and use of computers for consistency. On the one hand, William Twining describes the dominant focus of contention at the time of the emergence of American realism on what law schools should teach and the methods for teaching them. Twining (848) maintains that the scope and methods of legal research includes development of an empirical science to be performed by legal institutions, concepts, principles, and rules in a rapidly changing American society; and the relationship between law and the social sciences such as economics, sociology and anthropology. In any case, it might be said that these are not ultimate or philosophical questions although they may suggest further enquiry. On the other hand, we can see in the thoughts of Reginald Walter Michael Dias that contemporary American writers have argued to the effect of greater certainty in judicial decisions by calling for the Application of computers in judicial reasoning in so far as there is consistency in decision and attitude to adjudication. Dias (367-8) maintains that the use of computer is intended to deal with facts and attitudes, in terms of correlation between circumstances in particular cases and decisions given in them and correlation between personal attitudes to policies and decisions given. Facts refer to conditions under which a decision was taken and personal attitudes can be overcome by scalograms to show the sharing of a set of values by courts. But these assumptions have been rebutted on grounds that personal elements are relevant in considering the variety of facts available to varying circumstances concerning similar cases. So far, the debate goes on and it is not certain when the suggestion

might be considered acceptable. In what follows, we shall be concerned to show the logic of American law.

EXPLORING THE LOGICS OF AMERICAN LEGAL REALISM

There are attempts to compare and contrast legal realism with positive, sociological and natural law theories. American legal realism is a combination of analytical positivists and sociological approaches. It is argued that realism is like positivism in looking on law as an expression of the will of the state; but for realists, the state expresses its will through the medium of the court. Explaining this view in terms of the notion of command, Paul J. Fitzgerald maintains that legal realists look on law as a command of the sovereign just as legal imperativists do but their sovereign is not a monarch or parliament, rather it is the court or judges. Fitzgerald (35) argues that to be a legal realist is to see law for what it really is without any pretensions. In other words, to take a realistic attitude toward law is to see law in terms of its practical function in society. Law is therefore not an abstract entity in the Platonic world of ideas; it is instead a fact of human experience. In addition to this, Dias (620) maintains that American realism is partly sociological – in as much as the approach is interested in sociological and other factors that influence the law, but they are concerned with law rather than with society. Like sociologists, American realists have interest in the effect of social conditions of law and its effect on society while emphasizing the need for *a priori* revelation of the behaviour of lawyers. Realism is a revolt against formalism: which is also why legal realism is opposed to legal positivism and natural law theory.

Realism is a standard view which affirms the actual existence of some kinds of thing, or some kind of facts or state of affairs. Its practical utility is particularly felt in America and Sweden, which is why we have heard of American and Scandinavian legal realisms represented by Oliver W. Holmes (1841 – 1935) and Karl H. Olivecrona (1897 – 1980) respectively. Freeman (872) remarks that Scandinavian realism operates within the European empirical tradition while American realism bears important characteristics of the English tradition. Two senses of legal realism are historically well known in America – Old and New or classical and modern. The old sense of realism is a logico-metaphysical theory, which deals with the reality of universals in themselves and their relations to individuals or particulars. Its classical expression is the belief that universals are real in the mind of God, in nature, and in their historical apprehension by human minds. The modern sense of the term is a logico-epistemological theory, which involves the belief that phenomena exist independent of consciousness and this is often termed “empirical” or “naïve”

realism: and on this count, our perception of universals is governed by their intuitive cognition. We can therefore explain the relationship between metaphysics and epistemology by reference to logic. In the attempt to shape legal realism, the logician is confronted with the existence of formal and material relations as well as the possibility of interaction between them such as necessary and contingent as well as theoretical and practical. The logician either looks for necessary connection between phenomena or he looks for necessary conditions for supposing that such a connection exists. However, Joseph Omoregbe maintains that contemporary philosophers are not interested in necessary connection but in necessary conditions to justify relations of cause and effect. Based on this, it would seem that logic can serve as a connecting rod between metaphysical and epistemological entities, thus broaching the distinction between them. In American law, the old and the new approaches tend to interact (for instance) when we see what judges and lawyers do in the courts as an imaginary auction in which the highest bidder is declared winner.

Underlying the philosophy of American legal realism is a two-fold system of logics, one concerned with its construction and the connections within the system, the other concerned with its operation or working out within the people's culture; and together they share a tendency towards broaching the dichotomy between seemingly opposed realities such as thought and action, theory and practice. Our construction theory on American law therefore involves internal and external logics: the internal aspect is concerned with interconnectedness of those features that link the central tenets of the old and new realisms together, while the external aspect is concerned with the harmony that exists between thought and action in American legal practice. In this section, we shall examine the internal aspect by explicating its structure with a view to establishing the interconnectedness of the elements within the system, while we shall leave the external aspect for the next section on questions about the interaction of law and life in the American society.

Central to the logic of American legal realism is the claim that law is the practice of the courts. Holmes (457) explains this thesis by saying that law is the prophecy of what the court will do in fact and nothing more pretentious. More formally, this means that law is judge-made; and this view is shared by all realists in the sphere of jurisprudence. Holmes' thesis is concerned to show that law is prediction because the "bad man" (litigant or criminal) is interested in predicting the outcome of judicial decisions instead of what the statute books say about conduct. Although scholars maintain that legal realists generally do not constitute a particular school of thought, nevertheless we sometimes refer rather loosely to the existence of such a school of law. The starting point for describing American

legal realism may be found in Karl Llewellyn's *Some Realism About Realism*, In which Llewellyn writes:

What then are the characteristics of these ferments? One thing is clear. There is no school of realists. There is no likelihood that there will be such a school. There is no group with an official or accepted, or even with an emerging creed. There is no abnegation of independent striking out, we hope that there may never be. New recruits acquire tools and stimulus, not masters, nor overmastering ideas. Old recruits diverge in interest from each other. They are related, says Frank, only in their negation and in their skepticism and in their curiosity. There is, however, a movement in thought and law. The movement, the method of attack, is wider than the number of its adherents... (830-831).

We may agree with Llewellyn that there is no particular school of American legal realism, because thinkers within this tradition are practicing lawyers and law teachers who happen to be drawn from several strands of opinion. The implication seems to be that they do not share a particular set of opinions. In spite of this, we can determine the logical structure of American legal realism from the standpoint of similarities and differences of features of the differing strands of thinkers.

Although Llewellyn has clearly enumerated the reasons for supposing that there is no school of realism, nevertheless he agrees with other thinkers that there is a movement in thought and law which claims this label based on its approach to enquiry. Llewellyn refers to thinkers within this tradition as sceptics. In line with this view, Jerome Frank argues that American realists constitute two sets of sceptics, namely "rule" and "fact" sceptics. According to Frank (827-829), American realists are broadly divided as to whether law is a rule or fact. The attempt to explain the logics of American legal realism recognises the important doctrine that law is a fact rather than a rule, and this deals with the status of propositions about the existence of law. The question to be addressed is what do these propositions express? American realists share the belief that the kinds of thing described by law exist. Arguing for the nature of such existence, these realists maintain that the things described by the concept of law exist independent of us. They look at particular laws (or rules of law) as artifacts of our minds or language, or conceptual scheme. More so they believe that legal statements are not reducible to other kinds of statements, thus revealing them to be applicable to other subject-matters. Moreover it seems to them that legal statements describe aspects of the world and therefore their truth and falsity depend on facts in that world. This shows that we can attain truths about law,

thus making it appropriate to believe those things we claim in the field of law. American realists therefore share a distrust of traditional legal rules and concepts insofar as they purport to describe what courts and people are actually doing. Also identified with this crop of thinkers is a distrust of the theory that traditional rule formulations are the operative factors in predicting court decisions. There is a belief in the worthwhileness of grouping cases, thus emphasising the interconnectedness of laws. There is an insistence both on the evaluation of law in terms of its effect and on the worthwhileness of trying to find these effects and an insistence on pragmatic and sustained attack on legal problems, as well as a view that judicial behaviourism is guide to the idea and most pragmatic of laws. With these views in mind, American realists hope to establish effectiveness of law as required by justice.

The relation theory of American legal realism is concerned with the attempt to show inter-connectedness of phenomena in the field of legal practice. In looking at law as a prophecy of the court, we are not only concerned with the process of adjudication but also with institutions of legislation and administration. At the centre of these institutions are the people whom the law is meant to serve. Thus American realists focus on how law applies to man in his environment. In view of this, the relation theory hinges on interaction between man and society side by side the roles played by law, courts and culture in the attempt to enhance social life. The essential elements of this logic are:

- i. a conception of reality as an existent in the empirical world rather than a mysterious entity in the rational or intellectual world where knowledge is conjectural.
- ii. a view of man as rights bearer: and therefore man is the reason for law; thus man is a set of normative interactions.
- iii. a belief that society is a collection of individuals or community of persons represented by a system of normative relations.
- iv. a temporary divorce of "is" and "ought", which is to make a distinction between particulars and universals.
- v. an approach that takes truth to be the workability of a claim or theory: a practical rather than abstract way of looking at life.
- vi. a claim that the institution of law is rooted in the life of its community, thus making language and culture important legal considerations.
- vii. the view that legal reasoning is predicated upon the rhetoric of a self-regulating market system: thus the life of the law is both logic and experience.
- viii. the fact that a validity of law is its predictability: thus law is what courts will decide and this leads to the demand for greater certainty.
- ix. the justification of bivalence as the basic principle of the certainty of law: for example a person is either guilty or not guilty.

- x. a social order in which law is looked upon as a means to social ends: thus law is engineering.
- xi. a development plan in which law reflect social change rather than dictate it.
- xii. a system of practice in which the purpose and usefulness of law determine its shape and design.
- xiii. the pursuit of fairness through effectiveness and efficiency of the law as the ultimate goal of justice: thus law points to aesthetics instead of ethics.

Certain points of departure are common to all American realists. To borrow from Llewellyn's expression, they bear a cross relevance, a complementing, and interlocking of their various results as if they were guided by an invisible hand. They also show a tendency to similar fighting faith in their methods of attack on legal problems. These tenets constitute the bedrock of affirmations and negations for logic of American realism.

Central to the conditions required to structure the internal logic of American legal realism is the tenet denoted by the concept of "reality" that distinguishes between experience and reason as one of the various dichotomies found in the theory: an one of its most formidable expressions is the principle of bivalence, which appears to have attracted serious criticisms from philosophers in the domains of logic and science. Michael Dummett, a British philosopher of logic and language, has put forward a critique of realism with profound implications for the operation of the American legal enquiry, but whether or not Dummett's argument is acceptable in the particular situation of American law is quite a different thing altogether. In his *Frege*, Dummett (5) maintains that unrestricted use of the principle of bivalence is the trademark of realism. The realist says that a proposition is either true or false; Dummett counsels here that the status and truth of this law of classical logic have proved very controversial for three reasons. First, it has problems that are associated with vagueness. Second, it is incompatible with constructivism: which divides knowledge between observation and theory statements. Third, it raises a number of problems with semantic paradoxes. The view therefore has to overcome some counter examples both ways. In his *Truth*, Dummett (49) criticises Gottlob Frege on grounds that the principle of bivalence has problems in practical situations. There are several examples to learn from. We know that Thomas Aquinas is a moral realist; and while writing as such, Aquinas (250) argues that moral reality is not sufficiently structured so as to make every moral claim either true or false. What does Kant say about this? Kant (273) believes that we can use the principle of bivalence very happily in mathematics just because it is our own construction.

What implications do these thinkers bring to bear on Dummett's assessment of American realism? This paper argues that Dummett's negative remark on the principle of bivalence tends to exalt the relevance of pragmatism to American legal thought as a philosophy which stresses faith in the workability of a belief or theory not itself capable of or dependent on literal truth or falsity and his view is sympathetic to verification and constructivism. On the one hand, verificationism is a metaphysical theory concerned with determination of meaning: and its argument is that the meaning of a statement consists in its methods of enquiry. This theory differs radically from the account that identifies meaning with truth condition and to which modern verificationists, like Dummett, show hostility to reductionism. On the other hand, Constructivism is a form of anti-realism which upholds the existence of facts and truth that are constituted by or dependent on our beliefs, reactions or attitudes. Incidentally, American realists deny these ways of theorising about law.

INTERACTION OF LAW AND LIFE IN AMERICAN SOCIETY

In the preceding section, we tried to draw from theory some implications for legal practice in America. In this section, we are to show in practice how the American officials approximate concepts such as reality, man, law, culture, justice, "is" and "ought", rule and fact. Incidentally, these concepts may be analytically interpreted into concrete elements such as constitution, society, litigants, court, officials, lawyers, judges, bailiffs, stakeholders (and so on). It is our intention in this part of the paper to bring the philosophy and logic of American law to bear on the formulation of a systematic science of legal practice in America. This is crucial to our goals in formulating the external logic of American legal realism. The important point to make here is that the external logic of American law will serve as confirmation theory, if it correctly represents the way law and life interact in the American society.

The external logic of American law is concerned with the interaction of law and life in the American society, and the way to describe this interaction is to search for causal connection among social phenomena. We restate the argument that American realists differ in many ways: yet we will agree that in spite of differences of opinion among these realists, they tend to be governed by the language of factual existence of law and the rhetoric of a liberal and legalistic society in which the individual has primary rights and sovereignty is vested in the courts. Now, we may ask is there any causal connection between the court and the society in American law? Perhaps, this is another way of asking about the relationship between law and life in the US. We may now have to search for and deal with the causal nexus of such interaction. Omoregbe (180) describes a

“cause” as that which brings about a certain effect or that by which something (an effect) is produced. However, pragmatists explain it as a social event requiring unity of thought and action. Metaphysicians look for universal principles or rational inference to support the relation of cause and effect, whereas empiricists see causation as a verifiable phenomenon of relations. But Francis O. Njoku maintains that the empiricists emphasis that generalises from the parameters of physical science is limited. Njoku (195) argues that the prototype of the scientific cause-effect relations where one thing follows another, has limited applications in the law or at the level of social life. It might be argued that states of affairs or conditions of fact may be related by causation; but following Hume’s thought on this principle, it would seem that the actual relation or causal power is imperceptible. Of course, it might be argued that legal causation is a body of rights, obligation and remedies that is applied by court in civil proceedings to provide relief for persons who have suffered harm from the wrongful acts of others. However, basically causality is a metaphysical phenomenon which has gained prominence in the vocabulary of the natural and social sciences. Therefore, the attempt to show causation with unity of thought and action, as American pragmatists do, goes to make legal discourse more scientific and less philosophical. But because this approach cannot completely eliminate philosophical reflection, we are not constrained to adopt a logical or rational analysis of American law.

We will like to clarify at this point that the American society of today is not a combination of *laissez faire* capitalist and socialist economic orientations, as some thinkers would say. We have argued somewhere in this paper that pragmatism is a form of humanism and is therefore concerned with welfarism. Modern America has a mixed economy or welfare state as it is often called. The essential qualities of capitalism in this society have proved far more compatible with the massive increases in regulatory and welfare programmes that most observers believed possible. The spirit of American life remains vigorously capitalistic because of the vitality of this cherishable economic principle.

Let us now discuss the concept of “reality” by seeking to know what it is that makes a person or ideas and practices American. A thorough investigation will reveal the fact that the unique and practical character of American political life is a product of their subjection to the ideal of “Americanism”, which involves love, devotion and unalloyed loyalty to America. Martin Diamond, Winston Mills Fisk and Herbert Garfinkel tell us in *The Democratic Republic* that every American citizen pledges allegiance to the Republic rather than to America as their fatherland so far as equality and justice prevail, thus making American legal and

political life society-based rather than cultural. Quite evidently, the American Declaration of Independence of 1776 begins with the expressions that all men are created equal and endowed by their creator with certain inalienable rights including life, liberty and the pursuit of happiness; and that the security of these rights informs the institution of government among men with the implication that government derives its just powers from the consent of the governed. The Declaration, as a practical document, is the theoretical transformation by the American constitution. America is a pluralistic society, and in that society the fact that man is rights-bearing animal is predicated upon the doctrine of equality of all persons and races. The rights of all citizens (Negroes and white) in America are embodied in executive orders and legislations. Such executive orders include the fair employment practices of law; promotion of equal employment opportunities in the Federal Civil Service and by private government contractors; and removal of racial discrimination in the armed forces. Notable legislations include civil rights laws which aim at ensuring the voting rights of Negro citizens; as well as literacy of society, equal access to public accommodations, assuring the rights of all persons to be served in hotels, theatres, restaurants, gasoline service stations and similar establishments. The existence of all these rights and many more go to foster equality of all persons and races. Members of the convention on the declaration of independence describe the fundamental rights that are based on the quality of all men and races as self-evident truth, because they see these rights as facts in the empirical world. This view is also given prominence by John Finnis, a natural law thinker in the contemporary era. In his *Natural Law and Natural Rights*, Finnis argues that natural rights are self evident principles that shape man's practical reasoning and are known to men not through any universal or rational inference but by way of an assemblage of reminders of the range of possibly worthwhile activities and orientations open to one. Finnis (171) maintains that we can gain knowledge of these rights from anthropological and psychological studies of society and these goes to show that these rights are empirically discerned. However, we will agree that in mathematical parlance, self-evident truths are not open to empirical proof, since they are knowable *a priori*. But as a realist, George Edward Moore argues in his *Proof of the External World*, that it is self-evident truth for him to be aware of his two hands stuck to his shoulders. Of course, Blackburn (345) maintains that the concept of self-evident truth is not a useful philosophical parlance because what is self-evident to one person may not be so to another. We are then left with the famous dictum proposed by John Locke, that nothing is present in the intellect which did not come through the senses and this serves to justify the American position.

In America, justice is synonymous with efficiency and effectiveness of the law; and one of the ways it has achieved this is through the structure of government such as the operation of the doctrine of separation of powers and the creation of the offices of the Attorney General and Deputy Attorney General as administrative staff. Clinton Rossiter explains the idea of practical equality in America, according to which the separation of the legislative, executive and judicial powers of government is the fundamental institutional feature of American National government. Based on this, Rossiter (104) maintains that the preservation of liberty requires the separation of the three great departments of power and this has helped in creating the most independent judiciary that the world has ever seen. The Attorney General functions fully as administrator, politician and presidential adviser as well as head of government's legal service. The executive has a veto and congress participates in appointments of officials. Nevertheless, it would seem that separation of powers in American government is not absolute; but we can strongly say that the "American judiciary is a coordinate branch of American national government – a statement that can be made of very few judiciaries in the world" (Diamond, Fisk and Garfinkel 286). American courts make much substantive law part of which occur in the traditional common law, they apply legislative statutes to particular cases and thereby make law by filling the gaps left or omitted by congress. By the construction that American courts give to statutory provisions they profoundly influence the meaning of the statute and its application. Impartially, Americans have given the statute a wealth of contemporary relevance and impact that its draft men did not dream of while remaining faithful to the fundamental policies of the statutes. More so, American courts exercise powerful and pervasive control and influence over practically all the executive and administrative processes and organisations and therefore over the actual task of government.

However, there is something to note at this point. It would seem that all constitutional governments throughout the world open the provisions of their constitutions with their source of authority, and for the Americans it is this source of authority that generates the feeling of equality of all men and races in terms of distribution of rights and privileges under the constitution. All true democracies share the belief that fundamental human and natural rights are inalienable irrespective of how they are discerned, whether empirically endowed and verifiable or rationally and spiritually discerned. Implicit in our political, moral and legal practices are such assumptions even though they may not be explicitly expressed in the course of deliberations at litigation. It is on the precincts of such assumptions that natural lawyers rest their legal philosophy. Now since the

American declaration of independence is inescapably adumbrated with concerns of fundamental and natural rights, we can see traces of natural law theory that are based on reason and presuppose ethical and metaphysical thoughts in American law. More so, where the court may require persons coming or brought before it to swear an oath by God that the evidence they will give in satisfaction of their claims will be nothing but the whole truth, it is a clear indication of recognition for natural law assumptions. Do American courts act in this way? The answer to this question is yes. Specifically as a requisite of procedural law, Americans pledge allegiance to their Republic only so far as the republic, "under God", seeks to deliver liberty and justice for all. The key expression in the foregoing statement is "under God", and we should be reminded here that America is fondly and popularly known as "God's own country" in thought and practice, thus a high degree of decorum is expected of officials in the dispensation of justice.

Diamond, Fisk and Garfinkel are concerned to show the legalistic thrust of law at the point of interaction with life in American society. These scholars see legalism as the connecting rod in the chain of relations between the court and the society. In other words, legalism is central to interaction of law and life in the American situation. Following this line of thought, Alexis de Tocqueville writes:

... in the United States a legalistic spirit is confined strictly to the precincts of the courts; it extends far beyond them.... There is hardly a political question in the United States which does not sooner or later turn into a judicial one. Consequently the language of every day party-political controversy has to be borrowed from legal phraseology and conceptions. As most public men are or have been lawyers, they apply their legal habit and turn of mind to the conduct of affairs. Juries make all classes familiar with this. So legal language is pretty well adopted into common speech; the spirit of the law, born within schools and courts, spreads little by little beyond them; it infiltrate through society right down to the lowest rank till finally the whole people have contracted some of the ways and tastes of a magistrate (283).

The possibility of making legalism the thrust of life in America is that in American society law derives from life, not the other way round. The argument being made here is that legalism is part and parcel of American culture (life ways of the American people). Since the judiciary in America is one of the three political arms of government, it is sometimes said with suspicion that in America, law is politics and cannot therefore be divorced from ideology. How do we understand this claim?

We will agree that in theory, law and politics in America are described in sociological parlance as social engineering. However, in practice law and politics are not treated as a matter of “full proof” engineering, but what the society seeks to achieve. The immediate use to which law is put or the benefits derived by society has been to balance conflicting claims or to enforce or foster the distribution of rights. We know that engineering science is concerned with improvement of physical facilities while legal engineering is concerned with improvement in the social system of society and this depends for its sufficiency on the practical consequences that a proposed decision is likely to bring about on society rather than the parties in dispute. As Michael Rundell describes it, engineering is the activity of designing things such as roads, railway, bridges, or machines. Rundell (488) sees an engineer as one who arranges something to happen, especially in a useful and skillful way; and we can say that it is in this way that judges manage to engineer litigation between disputing parties. Rundell gives an example of how government officials manage to engineer (broker) a meeting between two ambassadors. We can then say that as professionals, legal officials try to arrange litigation in useful and skillful way to suit society. The American judiciary is accorded a special status by the original constitutional convention of 1776 to settle cases. Incidentally, members of the constitutional convention maintain that the business of judging should be fair and unbiased and therefore as remote from the political process as possible. Nevertheless, it can be said that judicial decision-making in America “is policy reached only in a prescribed manner, and that this manner is crucial” (Diamond, Fisk and Garfinkel 284).

The fact that in America politics is not a matter of full proof engineering but what society wants to achieve with it explains the conscious direction of American law to the achievement of social goals, and it is in applying law this way that Pound (723) describes law as “social engineering”. On this account, Pound is arguing for more recognition and satisfaction of human wants or claims or desires through social control; a more embracing and effective securing of social interests; a complete and effective elimination of waste and precluding of friction in human enjoyment of the good things of life. This requirement is based on the role played by the application of pragmatism to American law. It stands to reason that countries, like Nigeria, which try to adopt British and American legal models at the same time, could be highly confused in making law work out to the advantage of their society, because utilitarianism which Britain upholds and pragmatism which America upholds can hardly fuse into a workable legal system. Nigeria and America inherited the utilitarian principle as British colonies,

but while America abandoned this principle at the time of her declaration of independence, Nigeria did not. Michael Nguzi Nnam explains Nigeria's adoption of the presidential system of government from America together with American legal realism without yielding to pragmatism. Nnam (45) maintains that with the adoption of the presidential system in 1975, Nigerian Judges had the privilege of discharging the law with a touch of "Americanism" in the face of the judicial process which retained the English heritage of status, common law and equity introduced in colonial days. In addition to this, Nnam maintains that in Nigeria it is the president who appoints federal judges with approval of the senate and he can single-handedly remove them from office without reference to the citizens. Therefore, a general lack of confidence in the Nigerian judiciary resulted from the fact that it could be manipulated by politicians. It is arguable that the culture, language and rhetoric of the Nigerian people do not fit the facts of American legal and political orientation. Unfortunately still, Nigerians have no choice but to think legally in borrowed languages – English and Arabic. In Nigeria, sovereignty lies in the legislature and the court is very far away from the people, aside the fact that the society is predominantly illiterate and leadership falls upon the few in the bourgeoisie or elite group usually called majority. The problem is not only with Nigeria but includes those colonised territories in all continent of the world – Africa, Antarctica, Asia, Australia, Europe, North and South America.

While exploring the nature of judicial power in America, Tocqueville (103-104) describes it as "passive" and this means that it cannot be exercised without being summoned forth, because a law has been disputed or rights are contested. The American judge is to be seen as an arbitrator who may not interfere in disputes unless there are contending parties to genuine controversy and a case is brought before the court for determination. The business of the judge may take the form of pronouncing upon a party a law by referring to a particular case and taking cognisance of the set of circumstances before him in his official capacity. However, since deciding cases by reference to particular circumstances tends to limit the scope of the judge's capacity, the other alternative open to him has been to use "general principles" (legislation) to decide cases that fall under the same category. Here, it is argued that where there is no dispute, there is no case and therefore there is no judicial decision. The practical approach of shifting between particular and general considerations explains realism's theoretical temporal break with positivism in terms of "law as it is". The distinction between the operation of rule and fact in American law could be seen as a matter of interpretation which is overcome by stressing the point that a legal rule is a proposition which expresses a set of facts, and this broaches the dichotomy between them.

At this point, we return to legalism both as fact and value of American law. First, what is legalism? Second, how does legalism operate in America? We may describe legalism as a programme of action based on the grounds that politics affect the life of the average American citizen through instrumentality of the courts. It is the practical means for setting up a workable ideological praxis for liberalism as a system of political practice in America. Blackburn (218) defines liberalism as a system of thought and political practice based on the individual considered as possessing rights against the government: such rights include equality of respect, freedom of expression and action, and freedom from religious and ideological constraint. We can see here that every American citizen is made to share the consciousness of how the liberal and legalistic attitudes of American political life interact. With liberalism the American society is able to absorb differing kinds of opinion; and with legalism it is able to integrate differing groups or classes of people. These are the ways in which the interaction of realism and pragmatism works in America for the Americans and therefore the truth about American law. As far as pragmatism in American legal practice is concerned, judgements in courts tend to reflect such legalistic attitude. Incidentally, it would seem that the judge is looking for the best decision having in mind present and future needs. It does not regard the maintenance of consistency with past decisions as an end in itself but only as a means for bringing about the best result in the present case. It is not clear from the foregoing whether or not one can completely avoid ethical and metaphysical considerations in explaining American law; but we can draw some implications for them. We are looking at a country with a free people characterised by equality of all persons under law. We are looking at a country in which the courts are independent and their salaries are free from external influences. We are looking at a country in which errors of the courts cannot be corrected by any power outside the legal system. More so, it is assured that officials cannot be removed from office for making erroneous adjudication. Yet we cannot deny the possibility of such errors or rely upon their impossibility because their problems lie in the region of ethics and metaphysics. American realists therefore have more credible grounds of investigations to make in this domain of discourse.

CONCLUSION

The central proposition of legal realism generally is that law is the practice of the court. This implies that law is based on custom and language plays an important role in a people's legal culture. The structure of this legal theory differs from one paradigm to another. We have reconstructed American legal realism on

rational grounds to show unity of theory and practice with the outcome that the realist movement in American law depends for its analysis on rational action and every rational action has its philosophy, logic and science. In doing this, we have been concerned to show certain unifying tenets of its diverse theorists as culminated in Holmes, Llewellyn and Frank. They consist essentially of man, society, law, court, officials and these elements lead to the idea of law as prediction. Three of these tenets are that judges are law-makers; that law is a technique for predicting judicial outcomes in particular cases; and that law should not shape social change rather than reflect it. It is however difficult to justify the validity of this procedure outside the culture of the American people. At first sight, American legal realism looks attractive on the basis of its philosophy and methods of logic and science. It is pragmatic; and pragmatism tends to have its origin in American culture. This means that the manner in which law is done in America belongs naturally to the people's way of life. Its model of liberal thinking looks forward to what will serve the community. American legal realism is therefore associated with the scientific method and applied to American custom, which is why American laws are more rather than less conventional. We are here charged with specific injunctions to look into the practices of the people within particular spheres of human endeavour, but because American law picks and chooses its objects in the spirit of its ideology, it cannot be seen as neutral. Legal actions are deducible from imaginary models representing legal rules.

The culmination of the foregoing is that it is important to study and understand a people's way of life before trying to adopt their legal experience. This is very crucial to countries which were colonies of foreign powers and which after their independence have not found veritable grounds for resting their legal order. For a country like Nigeria to seek after the American model, Nigeria must forge a philosophy, logic and science compatible with her diverse cultural practices, as well as language and rhetoric of the people's social existence and use this to develop a working plan of action in a practical sense.

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