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THE NEED FOR A FUNCTIONALIST JURISPRUDENCE FOR DEVELOPING COUNTRIES IN AFRICA

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The connection between law and society in nations all over the world is not only complex but is also in a constant flux, evolving intricately and almost perpetually as societies advance to idealized forms of government. In the context of development, the function of law that stands out most clearly is its deployment as a conscious instrument of social engineering, i.e. affecting the behaviour of individuals and groups toward planned social, economic and legal ends. It is ultimately to the law that governments are most likely to resort in the creation of institutions needed for development. Law is utilised either to lead or to follow the chosen developmental paths. While sociologists and legal theorists recognise the complex interplay between legal and social issues, differences continue to exist over how, in what manner and to what extent the interplay should be assessed when studying the role of law in the development of societies.

Over the centuries, different jurists have postulated varied explanations for the existence of law and its relationship to the societies the law seeks to govern. From 19th century analytical positivists' theories of law being a command of the sovereign habitually obeyed by the rulers, to legal realist, sociological and economic theories of law that advocate the study of law in relation to facets of social behaviour itself, these "Western" theories of law have, like the inherited legal systems from African metropoles, been transplanted and integrated in the legal culture of African nations. Jurisprudence, as a course taught to advanced law students in African law schools, largely involves the study of the Western philosophers such as John Austin, Hans Kelsen, Fredrich Karl, von Savigny, Karl Llewellyn, Karl Marx, Roscoe Pound, Benjamin Cardozo and others, philosophers who no doubt contributed immensely to the understanding of law as it operated in the specific societies the philosophers studied.

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The standard texts used in teaching jurisprudence are practically the same as those prescribed by law schools in the Western nations such as the United States or the United Kingdom. However, the use of this teaching material identical to that used in Western Schools is not only inappropriate for the understanding of the true state of law in developing nations but also contributes to the lack of development of a form of jurisprudential thought that should be indigenously developed for the understanding of a uniquely pluralistic society.[1]

Recognition of the primary role of law in shaping the development of African nations makes it imperative that studies on the nature and role of law be undertaken and understood from an African rather than a Western perspective. The law should be responsive to the actual social needs of each particular society. This is not to deny any role to the Western philosophical studies in understanding and teaching about law in Africa, as there is undoubtedly invaluable assistance in learning and making comparisons with other approaches and techniques in understanding law. However, there exists a paramount need for developing an African jurisprudence that is suitable for the unique African developmental situation. This need is based on two main factors: the unique socio-legal background of developing African nations and the call for a responsive legal system with more of a functional character than of an analytical nature.[2]

In many present day English speaking African nations, two sets of laws govern the relationships of society members. There is the modern statutory law by which all society members are governed and there is the unwritten customary law that governs the relationships of persons opting to live under traditional patterns of behaviour. The latter is largely in personal law matters such as marriage, divorce and inheritance. In countries such as Nigeria, Ghana and Zambia the application of customary laws together with the written statutory laws is specifically provided for in local legislation, following the inherited British-devised "repugnancy tests." These tests require courts that are conferred with the jurisdiction to apply the customary laws to follow such laws only insofar as they are

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1. *See* Hiller, *Reconstructing Law Teaching Programmes in Developing African Countries*, 11 E. AFR. L.J. 69-79 (1975) and *Teaching Jurisprudence in East Africa*, 10 FOREIGN EXCHANGE BULL., No. 2, 1969, at 3. *See also* ESSAYS ON THIRD WORLD PERSPECTIVES IN JURISPRUDENCE (M. Marasinghe and W. Conklin eds.) (1984).

2. While the role of analytical positivist theories of law is useful in the explanation and understanding of the coercive element in law, it is the functional nature and role of law that needs to be emphasized in postulating jurisprudential thought in developing nations.

not contrary to standards such as equity, good conscience, morality, principles of natural justice and are not contrary to the written laws of a country.[3] The existence of this duality of laws in the English speaking African nations requires that judges apply the customary laws on a case-by-case basis. The selective application of these laws with the recognised supremacy of the written statutory laws makes it imperative that judicial discretion in the definition and creation of the true state of the customary law be wide in order to provide flexibility in judicial reasoning. The laws that the judges define attempt a harmonisation of traditional customary laws and the "modern" statutory laws. Consequently, this body of law should be studied as a social phenomenon, part of the entire social process. It cannot be described in analytical terms as commands of the sovereign, for customary laws are true reflections of popular social practices. While the administration of customary laws is subjected to tests determined by the ruling sovereign, the fact that the laws emanate from society and not from a sovereign make the laws spontaneous and therefore readily assimilated in the societies.

Besides this unique plurality of legal culture, a second argument for teaching and advocating a unique African jurisprudence rests on the demanding role that law has in vastly and radically altering socio-legal institutions in developing societies. The fast pace of urbanisation and the changes in social codes of behaviour require that laws that are authoritatively promulgated be readily deployed to bring about the desired changes. The ability of a legal system to integrate the changes in a democratic manner often determines whether the system is in harmony with the desired expectations of the majority rather than those of the selected leaders and powerful elites.

Different jurists have emphasized a variety of social factors in defining law and its role in society. Some writers have urged the integration of conflicting societal interests through law, whereas others identify the differentiation of class interests as the key to identifying the actual state of the law. The postulation of an African jurisprudence has to integrate law as part of the social institution since law is, after all, meant to serve society's needs. The success of law in achieving its intended objectives often depends on the popular support of the changes brought about by

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3. *See*, for example, 12 of the Local Courts Act of Zambia, Ch. 54 of the Laws of Zambia. This section stipulates that the law to be applied by the local courts is customary law that is not incompatible with the provisions of written law and if it is not repugnant to natural justice or morality.

the law. As is often said, the law on paper has to accord with the law in action in order to reflect the actual, accepted social practices. The paramount goal of law should be purposeful and, if this goal is to be realised through democratic means, societal input in the formulation, execution and adjudication of laws is of utmost importance. Laws that are enacted with democratic participation have greater chances of being readily assimilated and accepted by the societies that the laws seek to govern.

With this postulated background, it is necessary to outline briefly the appropriate form of jurisprudence that is suited to the needs of developing African societies. This form of jurisprudence integrates the philosophical theories of jurists who have posited functionalist jurisprudence in the exposition and analysis of law in society.

Numerous jurists have in recent years emphasized the need to adopt social science methodologies in ascertaining the relationship between law and society in order to make law achieve its ends in society. Economic theorists argue, for instance, that law is a product of existing economic forces and consequently that law is a tool used by the ruling class to maintain control over the ruled class. Such theories of law, based on Karl Marx's and Frederick Engels' writings,[4] are popular among the "radicals" of new states who view the creation of a small rich class and a large poor class in developing societies as a direct result of the laissez faire system of government and the dominant, almost repressive, role of law and legal institutions in society. In many developing societies of Africa, conflicting interests created by the existing subsistence, peasant, worker and elite classes have eroded the traditional communalistic way of living wherein common societal concerns and interests overrode individualism. Further, in order to preserve the status quo, the rulers of many new states are seen by the radicals to hold on to power using the legal machinery to suit their own needs. This belief is often based on the unchanging leadership in African nations that is constitutionally sanctioned with supremacy of political parties over government institutions.[5]

Several examples of the above may be given. It is argued by Richard Quinney, for instance, that in capitalist societies, law recognises and perpetuates the powerful social and economic interests of the ruling class

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4. *See* K. MARX, A CONTRIBUTION TO THE CRITIQUE OF POLITICAL ECONOMY (N. Stone trans. 1904); see also F. ENGELS, LUDWIG FEUERBACH AND THE OUTCOME OF CLASSICAL GERMAN PHILOSOPHY (1934).

5. Malawi, for instance, has only one "life" presidency, held by Dr. Kamuzu Banda since the nation attained independence in 1964. Zambia too has had only one president since 1964. Both of these nations are under one-party rule, the former since 1966 and the latter since 1972.

and that criminal laws are consistently used to preserve domestic tranquility.[6] Robert Seidman and William Chambliss have also pointed out that among the conflicting societal interests that necessitate law, it is often the interests of important groups that determine the content of legislation.[7] Chambliss urges the utilisation of the logic or Marxian theory to an understanding of the nature of crime and criminal law.[8] He posits the theory that the economic interests and political power of the social class which controls the means of production defines the content of criminal law and that crime is by its very nature a socio-political matter. This is so, he says, because it is in the enforcement of law that the lower classes are subject to the effects of the ruling class domination over the legal system which appears to show a concentration of criminal acts among the lower classes, whereas, in actual practice, class differences in rates of criminal activity are probably negligible. Chambliss concludes that law enforcement systems are not organised to reduce crime or to enforce the public morality. Rather, they are organised to manage crime by cooperating with most criminal groups and enforcing laws against those whose crimes are minimal.

It must be conceded that some laws in society *do* reflect the desires of special interest groups such as some laws of contract enacted under the lobbying pressures of large corporations, as has actually been verified by some writers.[9] This does work to the disadvantage of groups without such political and material powers of persuasion, and certainly there exist some politically motivated laws in developing societies that seek to outlaw political opposition. However, not all laws can be categorised as being reflective of class interests. Many laws such as the laws of tort, laws of marriage, laws of evidence, laws of labor relations or even many aspects of criminal laws such as theft, homicide or rape are based on the necessity of ordering social relations in a manner that is widely acceptable to the majority in society. The majority's perception of what is morally right or wrong or what is reflective of actual needs in organising social behaviour accounts for the varied nature of laws in a particular society. It may be the case that in the enforcement of these laws the rich would have an advantage in securing better legal representation or even the ability to

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6. R. QUINNEY, CRIMINAL JUSTICE IN AMERICA (1974).

7. W. CHAMBLISS & R. SEIDMAN, LAW, ORDER AND POWER (1971).

8. C. Reasons & R. Rich, *Sociology of Law, A Conflict Perspective* 191-211, in TOWARD A POLITICAL ECONOMY OF CRIME (1978).

9. *See e.g.*, Graham, *Profits at all Costs: Amphetamine Profits on Capital Hill*, TRANSACTION, Jan. 1972, at 14.

deploy devious and illegal means to "buy" their way out of infractions of the law, but this does not make the laws any different; they are the same laws but enforced selectively. In each society, the proper enforcement of law and order depends on the honesty, integrity and impartiality of the law enforcement agencies. It would therefore be inappropriate to study law simply from a conflict perspective. Not all laws are the result of class position or class supremacy.

In contrast to economic theories of law as an instrument of domination in society, sociological jurists such as Rudolf Von Jhering, Leon Duguit and Eugen Ehrlich emphasize the need for a purposeful study of law that strives at a harmonisation of individual interests and general societal interests.[10] Such sociologists argue that no true study of law can be made without an understanding of the social milieu which the law governs and further, that to be binding, efficacious and respected, law has to be dictated by the social life of the community. Where change is needed but society itself has not considered or demanded it, then the role of legislation in changing social norms should be conceded.

This functional study of law in terms of its purpose or ends, started by Jhering's theory of harmonising individual and social interests, was elaborated further in Roscoe Pound's analysis of the function of law in maintaining social order and in effectuating social change.[11] Pound, who is considered to be the founder of American sociological jurisprudence, postulated the end of law as the satisfaction of different societal interests. These interests he categorised into (1) individual interests that involved immediate individual claims and demands,(2) public interests that concerned the claims, demands and desires of politically organised societies asserted through organisations, and (3) social interests that involved claims, demands or desires in the social life of civilised societies.[12] For Pound, the task of law is to achieve a balance and harmony among all of these interests and to recognise which interests are paramount at a specific time period. Pound was content to think of law as a social institution whose role is to satisfy social wants and that the claims, demands and expectations of civilised society ought to be satisfied as fully as possible without sacrificing basic principles of obligation and coexistence. Thus Pound writes,

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10. R. JHERING, LAW AS A MEANS TO AN END (I. Husik trans. 1924). See also E. EHRLICH, FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW (W. Moll trans. 1936).

11. R. POUND, INTRODUCTION TO THE PHILOSOPHY OF LAW (1954).

12. Pound, *A Theory of Social Interests*, 15 PAPERS & PROCEEDINGS OF THE AMER. SOC. SOC'Y 16 (1921); *see also, A Survey of Social Interests*, 57 HARV. L. REV. 1 (1943).

> I am content to see in legal history the record of a continually wider recognising and satisfying of human wants or claims or desires through social control; a more embracing and more effective elimination of waste and precluding of friction in human enjoyment of the goods in existence, in short, a continually more efficacious social engineering.[13]

Pound's theory of social engineering, i.e. ordering human relations through the action of a politically organised society, has contributed immensely to the development of a sociological jurisprudence. In many developing societies of Africa such as Zambia, there are many classes of individual and social interests due to the country's diverse ethnicity. Coexistence among individual citizens, foreigners (former colonial officials, businessmen and other individuals), tribal and other groups of people creates a variety of demands on the legal system. Often, the interests of these individuals and groups are conflicting and it is only through law that social compromises can be made. In such an enviroment, the task of law is certainly that of social engineering. Pound's functional approach in studying law is thus of great appeal because it does not study law from an aloof position as do the analytical positivists. Law should be studied and taught as a social phenomenon in the context of the total social process. Inquiry should be made as to what is expected of it, what it can do for society and how best it can be utilised for the attainment of a government's stated goals. As Llewellyn and Hoebel have argued, law should be looked at as a tool of getting jobs done in a particular culture.[14] The manner in which such a tool is employed in fulfilling its functions and achieving its ends will account for the success or failure of such employment. The ability and recognition of the influence of formal law in reforming and influencing the practices of old and primitive societies to become modern and futuristic ones is necessary in any analysis of a functional nature. The manner in which such a reformation is accomplished is crucial to the popularity of the resulting laws, particularly in vastly pluralistic societies in Africa. In the law making process, legislators should seek to involve wide societal participation through duly and democratically elected representatives. In the executive process, administration should be fair and just. In judicial reasoning the goal of impartial administration of justice, even in single party regimes, should be paramount.

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13. INTRODUCTION TO THE PHILOSOPHY OF LAW, *supra* note 11, at 47.

14. K. LLEWELLYN & E. HOEBEL, THE CHEYENNE WAY: CONFLICT AND CASE LAW IN PRIMITIVE JURISPRUDENCE (1941).

Other sociological theories that have emphasized an important aspect of social life in analysing the concept of law, are the legal realist theories that assert the paramouncy of judicial law-making in understanding the true nature of law.[15] The writings of legal realists such as Oliver Wendell Holmes, John Chipman Gray[16] and Karl Llewellyn[17] call for a pragmatic approach to the study of law which is the law in action in society rather than the law on paper. Legal realism is based on the premise that law cannot be understood without reference to the realities of human social life and one of the realities is that it is judges conversant with historical, economic and social aspects of life who define the true state of the law. The task of judges is not only to discover the law, but also to formulate it through the exercise of discretion as to principle or policy issues before the court. Actual decisions rendered are based on a particular judge's views of justice, conditioned in part by his personality, background and the values that he holds which then are rationalised into judicial decisions. Such realism is often urged to be a practical assessment of law in Africa since it is argued that judges appointed to the Supreme Courts by the leaders of One Party States more often than not will decide issues and the actual interpretation of law on political exigencies. It is argued, for instance, that in many politically sensitive cases, judges will bend the laws to decide cases in favour of the political climate.[18] Such decisions are rationalised as being based on the broad policy decisions of the ruling government. Thus, the argument made is that the true state of law in developing societies is what the judges decide in their adjudicative process.

Another approach to the study of law suggested by Llewellyn and Hoebel is that of viewing law as a tool measured against a body of stated objectives and problems not posed by it, but given to it for solution.[19] Thus, the authors urge that maximum utility of law would be achieved by use of techniques or processes that would assure the harmonious coexistence of old customary laws and new statutory ones. This would be done through the juristic method that sets out the jobs that need to be done through law and through the utilisation of both personal and traditional ways of attaining justice. The emphasis Llewellyn and Hoebel place on utilising past culture in understanding and improving the present

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15. O.W. HOLMES, THE COMMON LAW (1923).

16. J.C. GRAY, THE NATURE AND SOURCES OF LAW (1931).

17. K. LLEWELLYN, THE BRAMBLE BUSH (1930); *see also* JURISPRUDENCE (1962).

18. *See*, for instance, the arguments made by Picho Ali, *Ideological Commitment and the Judiciary*, TRANSITION No. 36, July 1968.

19. *See supra* note 14.

cultures is particularly apt for the circumstances of developing nations in Africa. The communalistic nature of many African groups that is espoused in the ideological beliefs of Humanism or Socialism calls for an integration of traditional customary beliefs and practices with the modern ways of living brought about by rapid urbanisation. Individual needs are urged to be less important than the general societal needs in order to restore humanity and justice in society.

Traditional jurisprudence is therefore limited as a legal science due to its allegiance to the state and law theory and due to its lack of analysis into the social elements that interconnect with law in a variety of ways. As has been noted by Adam Podgorecki,[20] legal theory should strive to ascertain both the conditions wherein law works most efficiently and the means whereby existing laws interact with social and economic factors. Analysis of law based on sociological inquiries into legal, moral, economic, cultural and other social norms provides a richer data base that may be used to ascertain the best means of attaining the objectives of the law. While it should be conceded that the element of coercion postulated in analytical positivism is necessary in the enforcement of law and in the authoritative promulgation of the laws, the aspect of coercion is and should be sanctioned by society itself through democratically elected leadership. Coercion should not emanate from the rulers' own volition.

Writers such as Donald Black advocate a "pure" sociology of law that excludes evaluative elements and legal policy matters that cannot be verified.[21] Black urges that law should consist of observable acts for the sociologist to investigate empirically. He argues that where an ideal with no empirical referent is used to compare with legal reality, the personal ideals of the researcher may be equated with society's legal ideals, bringing in elements of advocacy rather than empirical investigations. Further, he argues, a pure sociological approach to law should involve a scientific analysis of legal life as a system of behaviour rather than an assessment of legal policy because the latter involves value-added policy analyses which are irrelevant to a pure sociology of law. Such a pure sociological perspective is, however, inappropriate for modern studies of law because it ignores problems, values and doctrines of jurisprudence, together with the rules, principles and policies that are integral in constituting law. The purpose of social inquiry should be to ascertain both empirical and value analyses that have to be understood and integrated to ensure the greatest

20. A. PODGORECKI, LAW AND SOCIETY (1974).
21. D. BLACK, THE BEHAVIOUR OF LAW (1976).

utility of law. It is therefore this wider approach rather than the narrow "pure" sociology that should be adopted in the teaching and study of law in developing nations of Africa.

In contrast to Black's scientific approach to the study of law, Nonet and Selznick propose a re-integration of legal, political and social theories in jurisprudential studies.[22] These writers argue that each society's legal and social experiences are variable and contextual, that a legal order has many dimensions and that inquiry is best served when those dimensions are treated as variables. They advocate that the extent to which and the conditions in which the connections between law and social norms occur should be analysed to determine the true nature of law in society. Nonet and Selznick posit three types of law: repressive law, autonomous law and responsive law. A repressive legal system is based on the positivist attributes such as the subordination of law to power politics, it seeks to attain order rather than acceptance and has rules that are crude and detailed but only weakly bind the rule makers. An autonomous law, on the other hand, seeks legitimation, weakly binds the rulers and ruled and theoretically assures the independence of politics and law. A responsive law aims to achieve competence, seeks substantive justice, rests on a morality of cooperation and integrates legal and political aspirations with a blending of powers.

In the repressive law model, law is the command of the sovereign, who possesses, in principle, unlimited discretion. In this legal system, the state and law are inseparable. The conflict-based theories postulated by writers such as Karl Marx are based on the categorisation of law as being repressive. Arguments of social defence, national security and national unity are used to justify unconditional obedience. Criticism is branded as disloyalty. It is argued that in African One Party States, authoritarian tendencies continue to perpetuate one party rule wherein law and politics are integrated, with politics often overriding in cases of conflict.[23] By analysing a legal system from a bureaucratic perspective (such as the manner in which the institution is organised with reference to its purpose, authority, the nature of its rules, its decision making process and its career objectives, an assessment can be made as to the capacities and weaknesses of the institutions and their potential for the realisation of goals. The bureaucracy of a responsive legal system would rest on attrib-

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22. P. NONET & P. SELZNICK, LAW AND SOCIETY IN TRANSITION - TOWARD RESPONSIVE LAW (1978).

23. *See e.g.*, G.M. CARTER, AFRICAN ONE PARTY STATES (1962).

utes such as clearly identifiable purposes, hierarchically divided spheres of competence, codified rules for administrative regularity, systematic decision making processes with limited delegatory and discretionary powers and would be led by qualified and committed leaders who are appointed on merit rather than political affiliation or personal favours. The bureaucracy of a repressive legal system, on the other hand, rests on unsystematic rules, ad hoc decision making, and a confusion of private interests and public responsibilities. It is led by persons who are not qualified because their positions of authority are awarded as rewards for favours done to and for the leaders. This kind of bureaucracy has a precarious legitimacy and its capacity for achieving any developmental changes is very weak as it does not rest on popular support. The transition of a legal system from an ad hoc pre-bureaucratic nature to a stable bureaucratic one often depends on the ability and willingness of the leaders of a nation to change the existing status quo by radically transforming not only the nature of the bureaucratic process but also the leaders' own commitments to the desired changes. It is a democratic rather than a dictatorial government that assures stability in the legal process and that can bring about developmental changes with wide and popular support of the societies for whom the changes are instituted.

In pluralistic societies such as the Zambian, Malawian, Kenyan, Nigerian, Tanzanian or Ghanian, the involvement of society itself, through democratically elected representatives to government, is particularly necessary as compromises between conflicting viewpoints are often called for. Traditional and modern concepts of crime, marriage, succession or inheritance often conflict, making it imperative that clear-cut laws be enacted to govern the different spheres of action. The manner in which such integration is accomplished will directly affect societal reception of the law. Law should therefore have a unifying role by integrating the variety of opinions without alienating the specific groups who have a minority viewpoint. In many cases where laws are enacted to change societal behaviour without consulting the communities the laws seek to govern, the laws are either rejected outright or simply followed. The experience of Soviet Central Asia is indicative of this point. There modern laws were enacted to change rigid codes of behaviour of the Moslem communities. There was no consultation with regard to those communities' reception of the laws. The result was an outright rejection of the law.[24]

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24. *See* Gregory, *Law as an Instrument of Revolutionary Change in a Traditional Milieu, The Case of Soviet Central Asia*, 2 L. & Soc'y Rev. 179 (1967).

Thus, the true state of law in each society can only be understood by examining how the law is functioning with reference to a number of factors such as its legitimacy, the nature of its relationship to the political process, the judicial reasoning process, the nature of executive functions such as the exercise of delegatory or discretionary authority, the nature of coercive elements and the degree of participation of society itself in the promulgation and execution of laws in the society. It is fair to argue that legal systems that are coercive, weakly bind rulers, strive to maintain order and subordinate law to the political process, and expect unconditional societal obedience tend to be authoritarian and therefore repressive. It is often argued that the single party states of Africa are of this character and that law in such systems only serves to protect and promote the interests of the ruling leadership. Theories posited by writers such as Donald Black, William Chambliss, Richard Quinney and Robert Seidman emphasize that the key to understanding the true nature of law in society is to study it from an analysis of class position and class conflicts in society. The writings of these authors should be critically studied by both students and teachers of jurisprudence in African nations because the conflict-based theories of law provide some insight into the nature of particular laws in developing societies. Such contemporary study would provide richer and more pertinent approaches to an understanding of law than the early theories of jurists such as John Austin, H.L.A. Hart, Friedrich Karl, von Savigny, Henry Maine and the other Western and European philosophers whose works are routinely taught to students in African law schools.

While these conflict-based theories study only a small aspect of laws that are enacted as a direct result of power politics or class position in society, they provide a useful and comparative data base from which the more relevant and appropriate theories of law of functionalist nature should be posited and understood in ascertaining the nature of law in developing societies. Consequently, the consensus-based approaches to the study of law postulated by writers such as Eugen Ehrlich, Karl Llewellyn, A. Hoebel, Phillippe Nonet and Philip Selznick would provide a more appropriate jurisprudential study for the understanding of law in the developing societies of Africa. Law in these societies is a reflection of perceived social needs to which all reasonable men agree in order for society to keep on functioning as a group. Criminal laws are a reflection on what is in the public interest and reflective of the moral indignation of the majority in society. The inadequacy of the analytical positivist theories of law that are indifferent to the justice or injustice of existing conditions in a society makes them less appealing for developing societies

wherein the state has to respond to the widely changing social, legal and economic values and practices. Law has become a flexible instrument of social ordering. Further, the additional burdens of providing society with a wide range of amenities in modern welfare states has broadened the scope of legislation. Hence, the resulting monopoly of state power is prone to abuse, resulting in the leaders of African nations themselves flouting the limits of the law. This makes it even more imperative that laws should be constantly evaluated from a functional perspective with the paramouncy of societal interests rather than the leaders' interests prevailing. Rulers have to be subject to law just as the ruled are in order to assure a government of laws and not of men.

It is sometimes argued that when socio-legal theorists speak of society's interests, their values or their morality, they proceed on the assumption that society is an entity in itself, a human being with expressed preferences.[25] The argument asserts that it is very easy for such theorists inadvertently to substitute their own values and evaluations for those of society. While it is conceded that this is possible, it is also true of all other disciplines or jurisprudential studies. One cannot evaluate anything without starting from some sort of bias or another. This viewpoint somewhat echoes legal realist thinking, which holds that in judicial reasoning it is not possible for judges completely to insulate their reasoning from personal prejudices no matter how superhuman such judges set out to be. In fact, it is better to start with a bias than with complete ignorance, for biases increase scientific knowledge as the premises of inquiry are open to all kinds of values. Even scientific studies of law start with *a priori* assumptions. Law cannot and should not be studied without evaluative considerations; law is, in fact, part of the social sciences.

With these inherent and acquired biases, it is posited that the major thematic concern of studying and teaching law in African nations should be an empirical analysis of law that has the central goal of attaining legal responsiveness and legal and social effectiveness. Gathered empirical materials should then be assessed against articulated standards such as legality, rule of law or democracy. Such an approach infers a comparison of legal reality to a legal ideal which is a utilitarian approach. A goal-oriented legal development wherein law not only follows but leads social sentiment calls for a scientific analysis of legal institutions. An analytical,

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25. *See*, for example, the arguments of Donald Black, *The Boundaries of Legal Sociology*, 81 YALE L. J. 1086, 1090 (1972).

descriptive and evaluative approach in the study of legal institutions will enable an adequate and appropriate ascertainment as to whether law is able to attain and has been attaining its intended objectives. The ends that the law serves in society call for the evaluation of how best the ends may be realised in the interests of the majority in society. It is therefore not an analytical approach but a functional approach that is necessary in both teaching and studying jurisprudence in African nations.