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## THE POSTULATE OF THE HISTORICAL LAW THEORY AND CONFLICT OF LAWS: AN ARTICULATION OF AFRICAN (UKELE) COMMUNAL LEGALISM.

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### ABSTRACT

This essay is titled "Critique the Postulation of the Historical Law Theory and relate it to African Law. The postulation of the historical law school that law emanates from customs through an ordered pattern of systematized progress into a codified system in relation to African law forms the crust of this essay. To achieve this task, this essay adopts a critical method in exposing c postulation of the historical law school and the African Law (keeping in mind the Ukelle communal Law System). This essay questions whether there can be an independent law made or promulgated without targeting a given people or that there can be a people-free law? This essay claims that like the historical law school, laws emanate from their ground norms but insists that unlike the historical law school, laws in Ukelle Traditional System do not necessarily have to submit to through the rigor of systematic and strict evolutionary pattern of progress. Like Herder, this essay avers that there is a unique character with each culture, and as such Ukelle Traditional Law does not have to submit to any universal character of law.

**Keywords:** Nonviolence, resolution of conflict, social tensions.



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### INTRODUCTION

The truth that law by nature is purpose-driven; to guide, direct and order a people calls to question whether there can be an independent law made or promulgated without targeting a given people or aptly if there can be a people-free law? Or whether the purpose

is in itself people-driven or class-driven which brings to bear the issue of rational consensus and proportionate representation?

The historical approach to law holds that legal development is a function of the people. In other words, the law is tied to the mores, culture, or tradition of the people (Eyo & Ibanga, 208). There is a problem of balancing the social interest in the individual life with other social interests: which is, of course, a very different thing. It is in keeping with this criticality this essay is divided into an exposition of the historical law school represented by Savigny, Maine and Herder respectively, an expose of African Traditional Law with particular focus on Ukelle nation, a critique of the historical law school and a conclusion. This essay agrees with the Historical law school that Law as such is home-grown hence little enforcement is required. But did not account for a heterogeneous community system: "community consensus" will be if not impossibly difficult to locate. The problem of common consensus may always arise as to what the authentic community's values and virtues ought to be. Historical law school is unclear on whether its theory was for a homogeneous or heterogeneous society.

## **UNDERSTANDING HISTORICAL LAW THEORY**

The historical school of the nineteenth century views law as an evolutionary process and concentrates on the origin and history of the legal system. The law of a nation, like its language, originates in the popular spirit, the common conviction of right, and has already attained a fixed character peculiar to that people, before the earliest time to which authentic history extends. In this prehistoric period, the laws, language, manners, and political constitution of a people are inseparably united and they are the particular faculties and tendencies of an individual people bound together by their kindred consciousness of inward necessity (Gebriel and Mohamed, 6)

**Friedrich Von Savigny - The Spirit of the People (Volkgeist):** Savigny is of the German historical school of jurisprudence and a scholar of Roman law. On nature and source of law, he argued that:

- ✓ Law originates in custom which expresses national uniqueness. The principles of law derived from the beliefs of the people- law deriving from the conviction of the people.
- ✓ The Juristic skills stage; including codification which does no more than articulate the Volkgeist but adds technical and detailed expression to it- where "political element is required.
- ✓ The third stage is one of decay (96).

The first concerns law of a nation: in this prehistoric period the laws, language, manners, and political constitution of a people are inseparably united and they are the particular faculties and tendencies of an individual people bound together by their kindred consciousness of inward necessity. According to Gabriel and Mohamed, this popular spirit (Volkgeist) is the foundation of all of a nation's subsequent legal development. Custom is its manifestation. The popular spirit is shown, for example, in the various symbolic acts by which legal transactions are solemnized. The origin of the popular spirit is veiled in mysticism, and its crude beginnings are colored with romanticism.

But Savigny knew that the popular spirit did not create the complex system of rights in the land in the Roman law or in any other advanced culture. Accordingly, he supplemented his popular **spirit's origin** with the theory that the jurists and legal specialists advance civilization as representatives of the community spirit and are thus authorized to carry on the law in its technical aspects.

For Savigny, the law has a twofold existence:

- ✓ First, as part of the aggregate life of the community, and

- ✓ Second, as a distinct branch of knowledge in the hands of the jurists. Thus legal history has the holy duty' of maintaining a lively connection between a nation's present and its primitive state; to lose this connection will deprive the people of the best part of their spiritual life (97).

Savigny perceived law as reflective of the spirit of the people, the *volkgeist*. To him, legal development is evolutionary, not revolutionary. Laws are to be found, not made or given. According to Savigny, legal development passes through the early stage of unwritten custom. then codification of those customs and, lastly, purposeful legislation. He denies the universality of law. Recall that Cicero defined natural law as unchanging, universal, and everlasting. In denying law these qualities, Savigny emphasized the temporality of law and, the importance of time, space and geography in legal development. In other words, Savigny argued for the relativism of law (LAWS16: 69).

What idea in Savigny's theory has relevance in Traditional African Law becomes the concern of this essay.

In England Sir Henry Maine follows the historical law school and partly agrees with Savigny that primitive legal institutions are the rudimentary ideas of early law to the jurist what the primary crusts of the earth are to the geologist. "They contain, " he said, "potentially all the forms in which law has subsequently exhibited itself." (98). But departed from him in two ways, namely:

- ✓ He believed in stages of legal evolution, in which the primitive ideas might be discarded:
- ✓ He sought to discover by comparative studies of different systems of law the ideas which they had in common.

For Maine, society can be categorized into two: static society and progressive society. Static or stationary societies do not move beyond the concept of code-based law. It is solely a code-reference-based society, hence unwilling to reform the law due to a lack of certitude

of its outcome. Progressive societies on the other hand were to be found in societies like Western Europe where legal reform is dynamic and amenable according to the changes in time. For him, the characterizing features of progressive societies are legal fictions, equity, and legislation.

Maine's chief contribution in Jurisprudence is his analysis of legal change. For him, the development of legal systems follows six stages, namely; royal judgment, customs, codes, legal fiction, equity, and legislation. For him, Static societies passed through the first three stages: Progressive societies move at least through some of the latter three. Maine state that the origin of legal development can be traced to religion and ritual. This can be seen in societies that never developed literacy: their ritual is used as a means of education in circumstances where it would be futile to reduce instructions into writings (98).

**Royal Judgments:** This kind of judgment is divinely inspired and they form the first stage in the formation of laws. As the name implies it is the first stage thus the primitive stage which should not be confused with the command of a sovereign as it was not a law-making process, but dispute settlement. A good example is seen in the location of the site for hunting by the chiefs of the Community.

**Custom:** This is the stage of unwritten law; here knowledge of the principles and norms that ought to bind a given people are recognized as canons and binding (Eyo and Ojong, 32; Eyo 65). Examples are the rites of marriage, coronation, etc.

**Codes:** Codes which is the third stage and it is when written and published laws replace norms mere oral knowledge. This is not an era of change, but rather a period at which, because of the invention of writings, the usage is written down as a better method of storage. In Roman law the Twelve Tables, and in England, the gradual move to written law reports, represents the coding stage.

Static societies stop here and progressive societies move on. The major difference between the next three stages from the first three is that they are stages of deliberate change. Most of the changes in the content of law in those first stages were the result of spontaneous development. But to move to the next step it needed a deliberate act which according to Maine consists of the following three stages.

**Legal fictions:** That is an assumption which conceals, or affects to conceal, the fact that a rule of law has undergone alteration, its letter remaining unchanged, its operation being modified. Legal fictions are simply mere suppositions aimed at achieving justice by overcoming the rigidities of the formal law. Examples would be false allegations in writs to give a court jurisdiction.

**Equity:** The development of a separate body of rules, existing alongside the original law and claiming superiority over it by virtue of an inherent sanctity, is the second mode of progress and change. Such a body grew up under the Roman praetors and the English chancellors.

**Legislation:** Legislation represents the final development of the law. It is an institution through which various laws in the society are reduced into writing or codes. It is the enactment of a legislature in the form of either an autocrat prince. or a sovereign assembly (parliament) (98-100).

For Herder, the law is fundamentally a product of custom. Uduigwomen corroborates the non-universality of law when he stressed the unique character of every historical period, civilization, and nation. He holds that, for Herder, every nation possesses its character and qualities and none is intrinsically superior to others (203).

## **UNDERSTANDING TRADITIONAL AFRICAN LAW**

What forms core Traditional African laws are taboos- murder, rape, rites of chieftaincy appointment/election and coronation, obtaining by force, the deserialization of sacred

days, festivals, places, and persons e.g bringing a corpse before a King, into his palace, on special festive days, marriage customs, burial rite, divorce, and separation, etc. Corroborating the existence of African Traditional Law System as distinct from African Traditional Moral System, Mbiti writes: "it is kinship which controls social relationships between people in a given community: it governs marital customs and regulations, it determines the behaviour of one individual towards another". (104). These are laws, not morals and they have accepted norms because they are the product of ordinance of reason", "promulgated (is made known to everyone in the community ), for the "common good".

For Iroegbu, the primary function of law in communalism is the protection and the promotion or communal interaction. Politically defined, Law is a sanctioned rational directive which the members of the political community impose on themselves to be able to realize for all the best possible blossoming via mutual cooperation. Law is basically communal. It is known to be coercive by the members, but it is understood in the positive spirit of being made for the communal good. This is a basic principle of the traditional African legal system (74-75). For Asouzu, it is generally recognized that the traditional African gave much preference to arbitration as an alternative to litigation as a means of settling disputes and is heavily rooted in the retributive justice system (187).

In Ukelle community in Yala Local Government Area of Cross River State, for instance, laws are formulated as a consequence of unacceptable practices that the community considers detrimental to peace and order among her people. As such, it proceeds from certain consultations, followed by the meeting of major chiefs in council, then town hall meeting, and finally the promulgation-letting knew that so and so has become law with its respective sanction. Like the historical law school or theorists. laws are products of the convictions and customs of her people. indeed, the law in this circumstance is written in their hearts and is made popularized through age grade

meetings and religious settings. With the advent of documentation, codification is fast taking the place of popularization through age-grade and religious meetings (Asira and Edet, 76). As such law is a child of necessity ipso facto they are discovered from the moral content and belief of the people.

The view that there exist Ukelle Traditional Law and is sustained by Herder's rejection of universalizing tendencies. Like Herder, Ukelle nation possesses its character and qualities that are distinctively particular to her as such have the law. This is against Hegel's position that Africans are incapable of rationality and consciousness, hence have no laws.

## **CRITIQUE**

Savigny, Maine, and Herder that represent the historical law school have similar views in their understanding of the law. The legal theorists admit that primitive legal institutions are the rudimentary ideas of early law to the jurists. As it were the historical law school claims of law is in line with the nature of law itself. This is because the law is a product of the customs of the people. But in keeping with Savigny and Maine that law must pass through a rigid and rigor of systematicity, codification etc., their position becomes untenable and unsustainable given that there is nothing in the nature of nature that compels systematicity since there are products of primitive rudimentary ideas called customs.

As noticed in Traditional African Law exemplified in Ukelle community, law do not necessarily follow the strict, systematic, and sequential evolutionary stages typified in Savigny and Maine's theory of law. The Sophists pointed out that customs and standards of behavior earlier accepted as absolute and universal, and of divine institution, were, in fact, local and relative. Kelsen summarizes, 'there is one nature but we have different systems of law; different beliefs of goodness and badness'. Both the Historical theory of



law and African theory of law as exemplified in Ukelle system of law conceives law as tied to the primitive consciousness of its people-its custom.

Primitive consciousness in Hegel's conception of history is devoid of freedom in Africa because the law is a product of self-consciousness moving from art to religion and finally to philosophy, progressively. Hence Africa lacks self-consciousness and history therefore there is no law but mere wishes of their monarchs or rulers. Hegel's claim flaws in Viewing Africans as acting merely on the wishes of the ruler which according to the Separability school, it is in the nature of law to require an external authority to ensure its enforcement. It further fails viability and sustainability to the degree that pre-colonial African communities were majorly patristic and monarchial and its people depend solely on the wishes, whims and caprices of the ruler or the monarch. But with the post-colonial era, it is evident in the last lap of the 20<sup>th</sup> century that there has been an emergent African community. This being the case, people's thinking has evolved beyond this primal stage and has allowed reason to control their thought, hence there is an appreciable cooperative spirit and creative factors that characterized their socio-cultural and legal system. Law as such is home-grown hence little enforcement is required. In a heterogeneous community, "community consensus" will be if not impossible but difficult to locate. The problem of common consensus may also arise as to what is the authentic community's values and virtues. Historical law school is unclear on whether its theory was for a homogeneous or heterogeneous society.

## **CONCLUSION**

The historical law theorists have a worthy approach to law, namely; that law emanates from customs. In this vein, Ukelle law emanates from its customs, hence they have the law. Like Ukelle community as we have seen from the foregoing, its law does not necessarily submit to the rigid rigor of systematicity and codification to become law. Thus

it is evident from the above that Hegel's denial of Africa of law as well as Ukelle community is a non sequitur- it does not hold since the law is a product of people customs.

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