

Legalism and Human Freedom: *Personal Authenticity on Trial*.

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Abstract: *This paper examines the concept of legalism as it relates to human freedom and authentic existence. It argues that even though legalism makes for peace and stability in society, its insistence on slavish observance of laws, whether codified or not, forecloses the individual's initiatives and the ability to make pragmatic decisions as the need arises. Given the claim that love and service to humanity form the major aims of the law, the paper argues that the inability of people under a rule-based ethical system to actualize these aims in the face of extra-ordinary circumstances gives legalism a stamp of contradiction. In conclusion and by way of proffering solution to this dilemma, the paper submits that since man is ontologically a free being, the only system that will give him a sense of self-fulfilment and authentic existence is a system that gives him the latitude to always use his initiatives to make decisions and take actions based on the prevailing circumstances. Such a system must be one that focuses more on humanity rather than on laws and abstract principles.*

Keywords: legalism; freedom; authentic existence; situation ethics; pre-determinism.

I. INTRODUCTION

It was the eminent philosopher, Jean Jacques Rousseau, who once said that man is free, but is everywhere in chains. The truism in this assertion can be seen in man's life vis-à-vis the different enterprises of human activities that he engages in. The so-called chains can come in different forms, one of which is that it can come in the form of laws – both man-made laws and those believed to have been decreed by the divine and invisible powers/beings. These laws, more than any other thing, limit man's actions, goals and aspirations.

In his daily activities, man tries as much as possible to tailor all his actions and decisions (whether good or bad), in line with the laid down laws. On this interpretation, it can be argued that whenever a man does something adjudged to be good, it might not be because he intentionally wanted to do it, but rather because the law requires him to do it. The same can be said of bad course of actions that he might take. Implied in such a scenario is the idea that it is no longer the man that is acting, but rather the law acting through him. He strives to please his community, his government, his church, and his God.

Freedomists would argue that living our lives not in accordance with our own desires and intentions, but rather in accordance with the wishes and dictates of another person, authority or law, is indicative of inauthentic existence. Both African and Western religions have sundry laws, principles and ethical values which they want their adherents to observe strictly. Besides, there are circular laws which the citizens of a country are expected to obey. It is the opinion of the freedomists that law is very necessary for the peace, welfare, progress and survival of any human society. They, however, opine that excessive adherence to law in certain situations precludes the law from achieving these noble ends.

It has been observed that in Africa, most people entrusted with the power to make and implement laws do, for some reasons bordering on self-interest, choose to become legal absolutists. Legal absolutism puts a big question mark on the claim that man is ontologically free. It is, therefore, against the backdrop of this claim that

man is ontologically free that this paper explores how legalism impacts on human freedom and authentic existence with a focus on Nigeria. The rest of the paper is segmented as follows: part two is on conceptualisation of key concepts and the development of the theoretical foundations of the paper. Part three seeks to justify the theoretical grounds for the adoption of a non-legalistic tradition. To do this effectively, the paper demonstrated how legalism impacts negatively on human freedom and authentic existence. While part four suggests the way forward, part five centres on admonitions to the judiciary and the concluding remarks.

II. Conceptual Clarifications

2.1. *Legalism: What Does it All Mean?*

The concept of law is very vital to the understanding of legalism. The reason is that the concept of legalism is derived from the term “legal,” and what is legal is also construed to be lawful. Law is an indispensable phenomenon, not just for the development of any given society but also for the maintenance of peace and stability as well as vital relationship among the members of such society. It defines the boundaries for the exercise of individual rights and liberties. In other words, the presence of law results in the realisation by man that his rights end where another man’s rights begin.

According to *Osborn’s Concise Law Dictionary*, Eight edition, Law may be defined as a body of principles recognized and applied by the state in the administration of justice. As a system of rules usually enforced through a set of institutions, law affects every strata of human life in multiple ways including politics, religion, economics, and culture. Law is a double-edged sword. This is because it rewards obedience, just as it punishes disobedience. It is through this instrumentality of reward and punishment that law is believed to ensure justice. However, experience has shown that the type of justice obtainable from or guaranteed by law is in most cases quite different from that guaranteed by morality; hence, the distinction between legal justice and moral justice. From the legal perspective, justice is assumed to have been done if and when human or state actions, inactions and relationships (be it that among the citizens or between the state and the people) are strictly anchored or based on the dictates of the law. This means that any act done but is not captured within the circuit and purview of legal stipulations is deemed illegal and, therefore, a punishable act. The agent will be held legally answerable regardless of how noble his intention might be, so long as it could be established that the act in question is indeed a violation of a given law. It appears from this observation that intention is well-nigh irrelevant in the determination of legal justice. Such is the dilemma of legalism.

I understand the term legalism to mean no more than legal extremism. In other words, legalism refers to an excessive and slavish adherence to the letters of the law. It is that state characterized by a constant desire to make all our actions, inactions, decisions and judgments conform to legal injunctions. For Thomas Ash, legalism is a rule-based ethical system in which people slavishly follow their own absolute commandments (<http://users.ox.ac.uk/mert2049/philosophy/Ash-situationethics.shtml>). In Christian theology, legalism is viewed as a term used pejoratively with reference to an improper fixation on law or codes of conduct, or legal ideas usually implying an allegation of misguided rigor, pride, superficiality, the neglect of mercy, and ignorance of the grace of God, or, emphasizing the letters of law over the spirit (<http://en.wikipedia.org/wiki/legalism%28theology%29>). No person’s opinion captures legalism than the words of John Henry Newman. Commenting about legalistic posture of the church, he says: “The church holds that it were better for sun and moon to drop from heaven, for the earth to fall, and for all the many millions who are upon it to die of starvation in extremest agony...than that one soul, I will not say should be lost, but should commit one venial sin” (1918:190).

Legalism is the opposite of antinomianism. The terms “bound by law”, and “absolutism”, are used in referring to legalism, while “no law” or “nihilism” are those used in describing antinomianism. In his own observation, Wayne (1999) noted that legal absolutism (legalism) as a concept affirms that there is an absolute, objective standard of right and wrong (grounded in the holy nature of God himself), and that this code of moral conduct is set forth in the Bible, reaching its zenith in the New Testament. Under a rule-based ethical system (legalism), the courts do not and cannot allow themselves to be influenced by such extraneous factors such as the morality, mores, sociology, religion, culture and history of a people in carrying out their duty of law

interpretation except as captured by the contents of the law. On the whole, legalism can properly be said to be one of those existing schools of thought regarding human moral responsibility.

2.2. Freedom

Among scholars and philosophers, the term freedom has no settled meaning. It is, therefore, a controversial mental construct or an ideal of something. This view was corroborated by Friedrich Hayck when he submitted that “liberty” and “freedom” have probably been the most abused words in recent history (<http://en.wikipedia.org/wiki/liberty>). In its specific use as a moral and a social concept, freedom refers either to circumstances which arise in the relations of man to man or to specific conditions of social life (*The Encyclopedia of Philosophy*, 1967:221). Freedom can be defined from both positive and negative perspectives. Defined negatively, freedom is seen as the absence of constraint or coercion. On this view, it refers mainly to a condition characterized by the absence of coercion or constraint imposed by another person; a man is said to be free to the extent that he can choose his own goals or course of conduct, can choose between alternatives available to him, and is not compelled to act as he would not himself choose to act, or prevented from, acting as he would otherwise choose to act, by the will of another man, of the state, or of any other authority (*The Encyclopedia of Philosophy*, P.222). Seen thus, negative freedom is all about being free from compulsion.

On the other hand, positive freedom refers to the ability to do or actualise what one wants. It is, as Hegel noted, to will something determinate, yet in this determinacy to be by oneself and to revert once more to the universal (cf. Arua 2005:7). It was this individualistic and liberal conception of positive freedom that influenced R.C. Sproul’s conception of freedom in terms of our ability to choose in terms of desires. That is, making an unforced decision (<http://www.geocities.com/Athen/Delphi/8449/uncon.html>). Sproul contended that before we choose something, we must first desire to choose it. For the school of thought known as the political left, freedom is conceived as the ability of the individual to realize his own potential and pursuit of happiness (<http://en.wikipedia.org/wiki/freedom%28political%29>). In philosophy of law, freedom is conceived as the right to determine one’s own actions autonomously. It is argued that such right is generally granted in those fields in which the subject has no obligations to fulfil or laws to obey. According to the interpretation the hypothetical natural unlimited freedom is limited by the law for some matter (<http://en.wikipedia.org>). On the whole, it can be seen that positive notions of freedom represent an attempt to identify those specific spheres of human activity within which, as J. S. Mill noted, individuality (i.e. the right and capacity for individual choice and initiative), really matters (*The Encyclopedia of Philosophy*, P.223).

2.3. Human Freedom

Now, let us turn our attention to the question of what human freedom is all about. From the conceptual explications of freedom given so far, common sense will tell us that human freedom is all about the idea of humans being free, whether in terms of “being free from”, (negative freedom) or “being free to” (positive freedom). Hardly can it be doubted that freedom is a fundamental feature of human beings. Oguejiofor (2001:11) realised this truism when he noted (and rightly, too), that:

In spite of ... constraints to the assumption of total freedom, we must without fear of much contradiction affirm that in the order of nature, freedom is a specifically human feature. Man is apparently the only natural creature that has the facility to choose between alternatives, after he has been enlightened by his intellectual endowment.

Intuitively we know that human freedom is a universal dimension of human experience. The universality of human experience in this respect was attested to by Descartes. As recorded by Oguejiofor (2001:11), Descartes contends thus,

...I made no assumption concerning freedom which is not a matter of universal experience; our natural right makes this most evident... no one, when he considers himself alone, fails to experience the fact that to will and

to be free are the same thing (or rather that there is no difference between what is voluntary and what is free).

If our analysis of freedom above is anything to go by, it may be right to describe human freedom as that state in which individual human beings are at liberty to determine their own actions automatically without interference from another human being, state or law; it is the physical and mental ability of us as human beings to do what we want; the power for us to satisfy our wishes, or the extent of the choice of alternatives open to us; I also see it as the ability of us humans to choose in accordance with our desires, and to make unforced decisions; it is freedom from legalism; human freedom means that even though it is determined we think with a human mind, it is not determined what we think; it consists in the power or ability to do what we ought to do and in not being constrained to do what we ought not to do.

Implied in the notion of freedom is the concept of human moral responsibility. What this means is that by endorsing the reality of human freedom, we reject the determinists' slogan that "we are mere pencils in the hands of God", thereby accepting responsibility for our actions. On this, John Wesley wrote thus:

"Indeed, if man were not free, he could not be accountable either for his thought, words, or actions. If he were not free, he would not be capable either of reward or punishment; he would be incapable either of virtue or vice, of being either morally good or bad" (cited in Grider 1994:24-7)

Oguejiofor also endorses this view, for, as he noted,

The humanity of freedom is also seen in the almost universal act of apportioning approbation and blame. Human beings are naturally assumed to be responsible, and this is mainly on account of the presumption of their freedom ...the whole paraphernalia of rules, regulations and laws presuppose the human being that is able to choose and be responsible for his choice. Freewill is thus indispensable for moral responsibility (2001:12).

These classical views about human freedom as they are, pose a great challenge to the determinists and the predestinationists who argue that man is a finished product whose actions are predetermined.

2.4. Authentic Existence:

Authenticity is both an existentialist and a humanist concept. Derived from the adjective "authentic", the term authenticity is used to mean genuineness or the quality of being genuine (Oxford Advanced Learner's Dictionary of Current English, 2nd ed., 1963, p.51). But in existentialist and humanist philosophy, authenticity assumes a special meaning. The same goes for the concept of existence. Although authenticity to a large extent retains its original and ordinary meaning in existentialism, yet the existentialists' criteria for identifying authentic existence become an entirely different thing.

In the opinion of the existentialists, the conscious self is seen as coming to term with being in a material world wherein it encounters forces, pressures and influences that are very different from, and other than itself. Thus, for them authenticity becomes the degree to which one is true to one's own personality, spirit, or character, despite these pressures. It is one way in which the self acts and changes in response to these pressures (<http://en.wikipedia.org/wiki/Authenticity%28philosophy%29>). Being for the existentialists signifies the special quality of human mentality (otherwise called intentionality). This intentionality makes life a series of decisions, each involving an alternative that precipitates persons into an unknown future and an alternative that pushes them back into a routine predictable past. Seen this way, authenticity then involves accepting this painful state of affairs and finding the courage or hardiness to persist in the face of ontological anxiety and choose the future, thereby minimizing ontological guilt. Authenticity also involves the self-definition as someone with mental life permitting comprehension and influence over one's social and biological experiences. In existentialism,

authenticity is used with reference to human existence. And it is to the meaning of authentic existence that we now direct our attention.

We had already noted that authenticity and existence have specialized meanings in existentialism. Their usage is limited only to human beings. Thus, for the existentialists, stone, trees and animals are, but they do not exist. It is only human beings that exist. As Heidegger puts it,

“The being that exists is man. Man alone exists. Trees are, but they do not exist. Angles are, but they do not exist. God is, but he does not exist” (Kaufmaun (ed.), 1991:38).

It is for this reason that existentialism is dubbed a philosophy of human existence. To live authentic existence is, therefore, to really be at the helm of one’s affairs, personally directing its main course. It is, in fact, living one’s own life the way one has freely chosen and assuming responsibility for it (Omoregbe 1991:38).

Authentic existence requires that one should not simply drift along with the crowd, doing things because he sees others do them or because it is the custom of the place. On the contrary, one should freely choose one’s way of life and do things because one has freely chosen to do them. Every action should spring from one’s free choice. To submit one’s life to the dictate of another man is to live an inauthentic life, since in that case it is not the individual in question that is living his own life seeing that it is being dictated to him by another man. In one of his works, Sartre noted that freedom is the utmost parameter for determining the authenticity or otherwise of a person’s existence. It is freedom that paves way for self-determination and self-withdrawal. He writes:

Freedom is the human capacity of negating, nihilating and withdrawing from material things and situations. It is permanent capacity of self-determination, self-orientation and detachment. Man is not and cannot be anything in a fixed permanent way since, thanks to his freedom, he can always change (1956:18).

For Martin Heidegger, an authentic man is that man whose being is undetermined, unfixed and unstable. This is because for him, man is a being who is not yet what he is and who is more than he actually is at any given moment. An authentic man is one that

“His self-projection is a free projection by which he decides for himself what he wants to be... if he chooses his own possibilities and lives towards them, he thereby decides his mode of life, and this means that he lives an authentic life...(Kaufmaun, op. Cit., p. 72).

In his own conception of authenticity, Soren Kierkegaard opined that the cornerstone of authentic existence is consciousness. It is this consciousness of the self that enables man to live a detached life. Being conscious of himself as a unique individual, a truly authentic man does not allow himself to drift away with the crowd. In his own words,

Consciousness, that is consciousness of self, is the decisive criterion of the self. The more consciousness, the more self; the more consciousness, the more will and the more will, the more self. A man who has no will at all is no self; the more will he has the more consciousness of self he has also (1955:162).

Kierkegaard hated the crowd with passion because according to him, the crowd is not convinced about its actions, adding that it just acts without self-examination.

Virtually all the authenticity philosophers see authenticity as being connected with creativity. By this they mean that the impetus for action must arise from the person in question, and not be externally imposed. They also agree that since man is conscious of his self as being capable of intentionality and needing to make

choices, there is the need for him to recognize and confront the paradoxes of his life. Our ability or freedom to pause and make a choice between a stimulus and a response with regards to these paradoxes determines how authentic or inauthentic our existence is.

In the abstract of his work on Benard Lonergan's notion of authenticity, Braman, Brian Joseph noted that Lonergan conceived authentic human existence as a three-fold conversion that is intellectual, moral and religious (<http://escholarship.bc.edu/dissertations/AA19707862/>). On this view, he observed that intellectual conversion is the move out of a world of immediacy and into a world mediated by meaning and motivated by value. As for the moral conversion, he noted that it changes the criterion of one's decisions and choices from satisfactions to values. It refers to that moment when one opts for what is truly worthwhile, valuable and good as opposed to what is merely satisfying or ego-regarding. The experience of being grasped by ultimate concern marks the religious conversion. As can be gleaned from the above, the existentialist understanding of human authenticity or authentic existence flows from the notion of autonomy. Faden *et al* (1986:8) conceive autonomy as "personal rule of the self by adequate understanding while remaining free from controlling interferences by others and from personal limitations that prevent choice." Although philosophers usually distinguish broadly between personal and moral autonomy, it is pertinent to note that the existentialists' concept of autonomy leans more towards personal autonomy, as Waldron (2005:307) rightly observes, "evokes the image of a person in charge of his life, not just following his desires but choosing which of his desires to follow." I am of the conviction that authentic human existence is what Baker (2004) had in mind when talked about 'activity view of personhood'. He opined that "the law must not aim at eliminating or suppressing people's freedom to make decisions about behaviour or values....This view certainly identifies the person with agency, with action, and with the possibility of choice. In a sense, this is an activity view of personhood..." (pp. 225-6). Worthy of note at this juncture is the fact that authentic human existence as canvassed by the existentialists, and as to be construed in the context of the present discourse, does not advocate for absolute non-interference either by way of law or policy formulation. That would mean endorsement of libertarianism or antinomianism. Far from that, what is being canvassed for here is a legal system that is absolute to the degree of not accommodating extenuating circumstances that call for expediency.

From the foregoing, we have been able to see that at the heart of authentic living/existence is the notion of freedom. It is the cornerstone upon which the whole edifice or strive for authentic and personalized existence depends. Creativity, withdrawal and self-convinced commitment are some of the characteristics touted to be necessary for a truly authentic existence to take place. But a closer look at all these concepts will reveal that in the absence of the individual being free, the dream for their realization will continue to remain a fruitless exercise. Having said this, let us turn our attention to a consideration of how Legalism impacts on human freedom and authentic existence.

III. How Legalism Impedes On Human Freedom and Authentic Existence.

At this juncture, we shall examine how legalism impacts negatively on human freedom and authentic existence. This exercise will be done from both the religious and the circular perspectives.

3.1. From the Religious Perspective.

It has to be stated clearly here that laws and legalism (used to describe excessive adherence to the law) from the religious perspective are with reference to the biblical laws{as are contained in the Old and New Testaments} and any other laws believed to be of divine origin. We had noted earlier that for the proponents of legalism or absolutism, there exists a set of prefabricated moral rules or laws which form absolute objective standards of right and wrong. At any given time, man's activities, conduct or his relationship with his fellow man is expected to be based strictly on the tenets of these fabricated moral rules or laws. On this view, some actions are proscribed no matter the circumstances the individual finds himself. In other words, legalism does not encourage acting by taking the prevailing circumstances into consideration. It is for this reason that the freedomists accused the legalists of emphasizing unnecessary and improper fixation on law or codes of conduct,

or legal ideas, adding that such trait is characteristic of misguided rigor, pride, superficiality, the neglect of mercy, and ignorance of the grace of God (<http://en.wikipedia.org/wiki/legalism%28theology%29>). Relying on the principles of 'proportionalism' which says that it is never right to go against a principle unless there is a proportionate reason which would justify it, the proponents of situation ethics argue that in certain situations, other moral principles (laws) can be set aside if love is best served.

Implicit in the concept of legalism (from the religious point of view) is the idea that man is not free. Situation ethicists (or ethical relativists as the case may be) argue that man is essentially a free being who must in that capacity decide what is moral or immoral in a given situation since, according to them, all conduct is relative to the circumstance. When taken to a more constrained position, legalism means that actions are adjudged moral (legal) or immoral (illegal) regardless of the circumstances in which they occur. Thus, regardless of the beliefs and goals of a culture or society that engages in such practices as lying, slavery, war, favouritism, capital punishment, etc; legal absolutists might adjudge them to be inherently and inarguably immoral (illegal). This legal absolutists' stance raises a big question mark on the goal or end of law in the same way that it has some far-reaching implications for the notion of man as a free being.

What, if one may ask, should be the end of law if not to achieve love and greater good for mankind? J.I. Parker (www.the-highway.com) observed that the argument traditionally made for Christian morality is that love can be, and indeed has been, embodied in rules, so that in using the moral principles of the scripture prescriptively a Christian will always be expressing love, never frustrating it, and so will always be doing the will of God. From this legalists' conception of rules vis-à-vis love, it appears that both the legalists and the situationists agree that 'love' is and should continue to be at the heart of all laws. Their point of difference lies in the fact that while the legalists see this love as achievable only by a strict application of these rules, positive and negative, concerning types of actions, the situationists insist that the 'love' in question requires us to go extra mile and do more by paying full attention to the situation itself, adding that moral rules are not prescriptive rules with absolute authority but are rather illuminative. That is, they are relative, provisional and violable indicators of what line of action may be right here and now.

Applied to Christianity, situation ethics is the conviction that general moral rules applied to the matter at hand will not always lead one to what the command of God and the calculations of neighbourly love actually require. Quoting Fletcher in support of these claims, J.I. Parker wrote thus:

“...Action which the rules would call wrong will yet be right if analysis shows it to be the most loving thing to do. For no types of action, as such, can be said to be immoral; only failures of love in particular situations can be called immoral or thought of as forbidden, inasmuch as the fullness of loving action is the whole of what God commands (Ibid).

The thrust of the situationists' argument is that the whole essence of law is love, and that much as there are laws, there are no absolute laws other than the law of Agape love and that all other laid down laws were done in order to achieve the greatest amount of the love (Agape love). They further contend that man is a free being and that using rules and principles to determine his course of action is a negation of this freedom. As a free being, man should at any given circumstance use his reason to determine what course of action will be more loving. After all, “what the rules forbid is forbidden only because it is ordinarily unloving and nothing that actually expresses love in a particular situation is actually wrong” (Robinson 1964:34).

When analyzed carefully, one will observe that legalism is inseparably attached to predeterminism and situationists are of the opinion that if that is the case, then man is not free and should therefore not be held responsible for his actions. Classical articulation of natural laws, especially as it is related to human actions and relationships interferes with and indeed precludes the concept of authentic human freedom. Prior to the coming of the white men, Africans have their own traditional religion with its attendant laws and morals believed to have been ordained by the gods. These laws and morals prescribe the “dos” and the “don'ts” that are meant to regulate human behaviour and relationships.

However, with the coming of the colonialists, Africans embraced Western (Christian) religion. The new religion (i.e. Christian religion) has values, ethics and principles different in most areas from those obtainable from its African counterpart. The end result was “crisis of obedience” – which of these values should predominate over the other. The injunctions emanating from both religions are believed to be of divine origin. Acceptability to a particular group now becomes dependent on the person’s endorsement of the laws and values of that group, while jettisoning the other group and its laws and values. The African man became confused, and in the midst of his confusion, he started living a fake, inauthentic and depersonalized life – a life lived solely to please a group or rather “match along with the crowd”, to use Kierkegaard’s words. He (the African man) now strives, on a daily basis, to tailor his activities, conducts, mode of dressing as well as his relationship with others in line with either his own traditional religious injunctions, or those of the new-found religion. His decisions, actions and inactions can no longer be said to be consequent upon his freedom or rather his human capacity to negate, nihilate and withdraw from material things and situations.

Freedomists would argue that a life lived in the manner pictured above denotes man as a fixed object. But contrary to man being a fixed entity, Freedomists contend that man is entirely a free being who can use his freedom to pervert God’s intentions and purposes for him and can, at will, ignore His instructions for living in His creation. They deny that history is predetermined as legalism seems to imply. The freedomists posit that contrary to claim that history is predetermined, it is human decisions that determine history. By using values, ethics and principles claimed to be divine-ordained, legalism (from the religious perspective) has made the African man to believe that he is a mere instrument in the hands of God. But as Heidegger rightly noted, any person who, in a bid to please others or be acceptable to any authority, starts living his life in a way that he could not have personally chosen, is living an inauthentic life. In his words,

“If a person puts himself under the control or dictate of other people so that it is not he who has freely chosen for himself the mode of life he is living then he is living an inauthentic life, a depersonalized life (cf. Omoregbe 1991:72).

From the foregoing, therefore, our contention is that judging from the sundry Christian and traditional religious laws, mores, ethics and principles which the African man strives daily to make his life, actions, decisions, and relationship with others approximate, legalism has done no more than make him a slave to the so-called abstract laws, principles or ethics. It has given the African man’s freedom the picture of I may call “predatory freedom.”

3.2 FROM THE CIRCULAR PERSPECTIVE.

In considering how legalism in this respect has impacted on the quest of the African man to live an authentic life, we have to take a look at the man-made laws that govern our society. In so doing, we shall use the fundamental laws of our society and how they are interpreted and implemented as our centre of analysis.

All over the world, the legislature has remained the arm of government that is traditionally invested with the power of making laws for the good governance and welfare of the people, while the judiciary takes care of law interpretation and adjudication. However, it is mainly at the level of law interpretation that a country could be assessed as to whether it is in ‘love’ with legal absolutism or embraces legal liberalism. I use the terms “legal absolutism”, and “legal liberalism” to mean legal formalism, that is, a disposition or inclination to tie justice or injustice to the “form” or letter of the law rather than to the ‘spirit’ of the law, and the inclination to make the spirit of the law predominate over its form vis-à-vis the attainment of justice, respectively. Bringing this parameter of assessment to bear on the government of most African countries, one will not hesitate to say that our law makers, law interpreters and law executors, have, over the years, remained incurable legalists/formalists. For some reasons, however, our emphasis in this attempt to showcase how legalism impacts on authentic existence shall be on the judiciary.

Under a democratic dispensation such as we have in Nigeria today, people are supposed to enjoy certain fundamental rights which are contained in the constitution. According to the principle of the rule of law, the ordinary or regular law reigns supreme over the influence of arbitrary power. It also presupposes the equality of all before the law, notwithstanding individual’s status (Dicey 1930:188-202). On the other hand,

constitutionalism is a principle which states that every action of the government or its key players must be in compliance with the dictates of the constitution. Seen thus, implied in the notions of the “rule of law” and “constitutionalism” is a “limited government”. On the surface, these concepts are good, as they are meant to checkmate individual excesses.

However, they have their disadvantages, one of which is that they have resulted in justice being at the mercy of the law. In other words, justice becomes definable in terms of whether a given action, decision or resolution was taken strictly in compliance with the laid down laws. In other words, the intention of the actor becomes irrelevant so long as his actions, decisions or resolutions contravene the law. Again, some people have hidden under the cover of law making and under the notion of the supremacy of the law to supervise or influence the passage of laws that lack human face. That is, laws that cannot be implemented without violating the fundamental human rights of the individuals.

What is more, in the judiciary wherein judges and magistrates are entrusted with the responsibility of interpreting the law and applying sanctions and rewards where necessary, decisions and judgements or actions are still taken on the basis of what the law says. They hardly take the intention of the agent of the act into consideration. That is, they do not consider whether the person acted with a noble or good intention. It is true that ideally law is meant for the common good and human welfare, and therefore calls for obedience. But it is also true that sometimes certain exceptional set of circumstances occur that require an exceptional way of acting for the fullest expression of love to be achieved.

Nigerian courts apply the law unquestionably whether it is right or wrong; just or unjust, moral or immoral (Ugwuozor 2008:2). Speaking on the role of judges in the administration of law and justice, Mohammed Bello, a former chief justice of Nigeria, has this to say:

The judges, every judge in Nigeria has sworn to apply the law as it is. That is his duty: He doesn't change the law, he applies it . . . Any law which a judge think (sic) is bad, he applies. . . He cannot say, “I am not going to comply with it, he is not doing his job and he is not complying with his oath of office, which is to apply the law, no matter how hard it is (1989:25).

And in going further, and concerning the notion of justice, he observed thus: “Justice? That is theoretical, we do not do justice. We do justice according to law. . . We pass judgment which we know do not comply with our conscience” (ibid). The ex-chief justice has said it all. For a man of his legal standing to have publicly admitted that they in the judiciary do pass judgments which they know are against their conscience, goes a long way in showing the extent to which law can be an obstacle in the way of individuals who may genuinely seek to exercise their freedom in serving humanity. What is more, the ex- C.J.’s comments equally imply a claim that but for the excessive compliance to the law required of them, they would have taken a different course of action in some cases they decided in the past. What a contradictory goal of law!

In analyzing the ex – C. J.’s comments above, Ugwuozor has this to say:

The implication of His Lordship’s statement are many, one of which is that the courts are not, cannot, and ought not to be influenced by extraneous factors like culture and tradition of a people, their morality and mores, their sociology and history. It is a judicial attitude of crass legalism without any commitment to giving the society substantial justice and providing meaningful change through the law (p. 32).

Elsewhere, in 1980 the Supreme Court of Nigeria made a statement which buttressed the one earlier made by Muhammed Bello. The statement was to the effect that true justice can hardly be obtained by relying on the formalities and the technicalities of the law. The Supreme Court made the statement with reference to the case between one Mr. Aliu Bello and 13 others versus Attorney- General of Oyo State (cf. Ugwuozor 2008:36). In the said case, one Nasiru Bello charged with armed robbery offence was sentenced to death and later executed

even though he appealed his conviction and his appeal has not been heard. In the course of delivering her judgement on the matter, the Supreme Court observed that,

The spirit of justice does not reside in forms and formalities not in technicalities . . . law and all its technical value ought to be the hand maid of justice. . . the court will not endure that mere form or fiction of law, introduced for the sake of justice should work a wrong, contrary to the real truth and substance of the cases before it (see Ugwuozor 2008: Pp. 39-40).

From the foregoing, I was able to demonstrate that law is fundamentally related to morality, justice and love (for mankind). I also showed that while a law may satisfy all the criteria of legality, compliance to it in certain extra-ordinary situations will indeed be an obstacle to the realization of the end (morality, justice, fairness and love) which it seeks to achieve.

IV. Towards a Situatio-Legalistic Ethical System.

So far, I have x-rayed legalism, human freedom and authenticity in all their ramifications. In the course of our analysis, I was able to realize that there is a web of connection running through the three concepts. More so, my analysis also underscored the importance of law in every human society as a veritable weapon for the realization of justice, love, equity and fairness. However, I did discover that although obedience to law is imperative for the sake of common good and welfare of mankind, excessive adherence to the contents of the law sometimes hinders it from achieving this end. In the face of a situation where by a person is faced with the twin problems of obeying what the law says (in which case he will cause pain and harm to mankind), and setting aside a particular law in that particular instance in order to do a greater good for mankind (say, save a dying man), but in which case, he would have run foul of the law, what do we think is the solution? The solution is what this section attempts to achieve.

Since the primary aim of law is to achieve love, justice, equity and fairness, it is my candid opinion that an exceptional approach should be adopted in the face of an extra-ordinary circumstance requiring an exceptional way of acting provided analysis shows it to be the most loving thing to do at that time. Exceptional situations should be met in their own merits, while setting aside the existing law(s). By this I am not in any way suggesting the adoption of antinomian ethics. After all, I am not an antinomian situationist. In the same way, I am not advocating the abolition of law, or the creation of a lawless society. My position is not opposed to law or else I would be termed an anarchist.

My contention is that the law should exist, and everybody ought to obey the law. But in any situation where the achievement of greater good for mankind calls for the suspension of a particular law, then, that particular law should be suspended. The suspension does not mean that the law in question does not exist or has ceased to exist. It only means that it has been exceptionally overridden. A situation, such as the one envisaged here, can be comparable to an instance of a miraculous occurrence whereby a given law of nature is supernaturally and exceptionally overridden, paving way for the actualization of certain ends which would otherwise be impossible on the basis of the particular law of nature so overridden.

I call the system I am proposing a 'situatio-legalistic ethical system'. It describes a situation whereby mild-legalism co-exists with occasional situationism. In other words, it is a situation in which legalism predominates over situationism but does not shut its doors against it. Since man is ontologically a free being, it is only a situation-legalistic ethical system such as I am proposing that will give him (man) the latitude to use his initiatives to make decisions and take actions based on the prevailing circumstances, thereby making him have a sense of freedom, self-fulfilment and authentic existence.

V. What The Judiciary Should Do: Conclusion.

I have already stated that the kind of system I propose does not sanction extreme legalism, nor does it endorse antinomianism (i.e. no law). It only argues for the acceptance of certain actions that might have been committed as a result of the existence of exceptional/extra-ordinary circumstances or situations as at the time the

said actions were committed. But does that mean that determining the most loving thing to do at a given situation should be left to the whims and caprices of individual citizens? My answer is, of course, no!

The position of this writer is that the judiciary has a big role to play, being the institution charged with the responsibility of interpreting the law and punishment of offenders. Since leaving the determination of what is the “most loving action” to take in an alleged exceptional situation at the mercy of individual persons will result in chaos and lawlessness, it is my strong position that the judges of various world jurisdictions should be legally empowered to use their discretion to decide, in the face of certain offences, whether an exceptional situation existed as at the material time the said offence was committed (as claimed by the accused), and whether the act, even though it violates an identified law, was the most loving thing or the best course of action any reasonable and well-intentioned person could have taken in that instance. Where a judge is satisfied that such a situation existed, and that the accused acted in good faith (i.e., he acted out of noble intention), then the judge should go ahead and set him free. By so doing, we shall have nothing to lose, except the shackles and manacles of human freedom and authentic existence. I conclude this paper with Miller Murrow’s admonitions. He says: “He who makes the law his standard is obligated to perform all its precepts, for to break one commandment is to break the law. He who leaves by faith and love is not judged on that basis, but by a standard infinitely higher and at the same time more attainable” (cited by Fletcher, 1966:30). I completely agree with Fletcher that “[t]he situational factors are so primary that we may even say “circumstances alter rules and principles”....It is empirical, fact-minded, data conscious, inquiring. It is anti-moralistic as well as anti-legalistic, for it is sensitive to variety and complexity. It is neither simplistic nor perfectionist. It is “casuistry” (case-based)...”(1966:29).

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