

Eurocentrism and the Separability-Inseparability Debate: Challenges From African Cultural Jurisprudence

by

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Abstract

African jurisprudence, in contemporary times, seems to be faced with two difficult tasks: one, the challenge of the possibility of a worthy cerebral contribution to jurisprudence and the history of ideas in general, and, two, the disturbing reality of what is known as the Eurocentric foundation of choice concepts, persistent questions and controversial issues in Western jurisprudence, which passed itself as the standard definition of universal jurisprudence. This paper observes that the first task is defined by and a direct response to the second task. In transcending this myopic understanding of African contribution to the history of ideas, Western jurisprudence and jurisprudence in general, this paper takes issues on the controversy between naturalists and positivists on the relation between law and morality in the light of African legal theory. Examining three African cultures, the paper discovers that the more forceful and popular positivists', the separability thesis is not easily and commonly entertained. The paper also equally discovers that law, in those cultures, not only has an ontological moral foundation, but that the impossibility of separating law from morals which derives not just because morality is one of the sources, but also from the argument that no legal concept or rule exists without an ethical implication or dimension.

Introduction

Conceptually, what can Africa contribute to the world, and the history of ideas? More specifically, what has Africa contributed to the world? Some, like Hugh Trevor-Roper and Andrew Foote, would say, respectively, that it is pure darkness¹ or earth's catalogue of crimes.² The irony of this perception about Africa is obvious: Africa's light was tampered with, and deliberately distorted by those who cast it into the immediacy of eternal loss. Incidentally, this perception has become a pervading and phenomenal characterisation of Africa whose historical past bears the primacy of true human civilisation.³

This perception, in its entire ramification, is a grand historical distortion. Thus, the debate over the primacy of Occidentalism and Orientalism in the entire history of thought and thus a classical demonstration of the Eurocentric nature of social history in general, and particularly, how cultural distortions are often sponsored into the substance of intellectual history.

The project of Africa renaissance is an attempt to correct this distasteful perception about Africa. In precise terms, African philosophy, though a latecomer to the scene of philosophical interrogations of history and ideologies of African people is engulfed in the burden of a thematic and cultural search for self definition. The essential task of African philosophy in its half-century existence is the quest for pertinence in what can be called a search for the significance of its hidden history. The thematic and cultural preoccupation of the African philosophy project can be undertaken in the important, though neglected, discipline of jurisprudence. Thus, the implication of an African cultural jurisprudence cannot be overemphasised. What then is jurisprudence? What is its significance for the African philosophical project, and what are the contributions of Africa to jurisprudential controversies?

Generally characterised, it seems evident that jurisprudence and the discussion of its problems has a Eurocentric bias, often couched in the form of a denial. And thus, via Western canonical works, a great denial of the possibility of African jurisprudence often grounded in what I call the 'myth of meritocracy' which is the view that whatever is considered to be African does not have anything intellectually profound and thought-provoking to contribute to investigate aching and puzzling questions and problems in philosophy, generally, and jurisprudence, particularly. What this means is that there exists a fundamental lacuna in relation to the general treatment of fundamental jurisprudential problems within the canons of African jurisprudence; although, the cultural basis for jurisprudence is perceived as a misnomer when, in actual fact, philosophy itself is a cultural inquiry.

Taiwo's capture of this dilemma for Africa is poetic and pungent when he contended that "all too often, when African scholars answer philosophy's questions, they are called upon to justify their claim to philosophical status. And when this status is grudgingly conferred, their theories are consigned to serving as appendices to the main discussions dominated by the perorations of the "Western Tradition"⁴ To corroborate Taiwo's timely observation, jurisprudential problems such as the nature of law, the source and grounds of obligation, the nature of justice, the relation between law and morality, and a few others, have received less and insipid attention in Western literature in relationship to jurisprudence. Thus, it is this absence that often serves as the basis for the denial of African jurisprudence altogether. And equally worrisome is the view that the attempts by African legal scholars to contemplate on general jurisprudential problems have been essentially apologetic rather than contributory.

Jurisprudence is, at the utmost, at an abstract level, concerned with an articulation, analysis and critical inquiry into the nature, functions, aims and significance of law. Law, thus, is the central subject matter of jurisprudence. It is thus the putting into action the philosophical elements in the consideration of law. Jurisprudence can therefore be defined as the philosophical investigation into the metaphysical, logical, epistemological and the ethical dimension of law. And since it incorporates elements of critical philosophical thinking, it is not a misnomer to conclude that jurisprudence is not another enlightened, intellectual enterprise, but rather a philosophy of law.

And secondly, jurisprudence is also the placement of philosophy into effect and action in the consideration and understanding of law. And it is in this sense that most accounts of the nature of jurisprudence in the literature assume an iota of interchange between jurisprudence, legal theory, legal philosophy or the philosophy of law and what is assumed in all these interchangeable terms is the raising of fundamental questions with respect to the study of law.

Thus, classical and contemporary jurisprudence is inundated, enervated and saturated with bewildering sets of problems. Hence, some are of the view that the nature and intellectual trajectory of those problems are in consonance with the general nature of philosophy; and since philosophy is said, to be an instrument of change through generations which often create controversy. Yet, without controversies, philosophy loses its essence and salience. Thus, the jurisprudential problems of the nature of law, the relation between law and morality, the nature of justice are conceived purely from a philosophical point of view.

Conversely this paper is an attempt to conceptualise the challenges poised to jurisprudence from an African cultural perspective. In other words, the context of this challenge is interrogates the basic epistemological current underlying African jurisprudence. In doing this, I focus on the contributions of select scholars, within the context of African jurisprudence, in relation to the resilient subject matter of general jurisprudence concerning law and morality.

Correspondingly, I also specifically give attention to on the ideas of Gluckman, Okafor and Adewoye with a look at the strength and weaknesses of their position in an introductory so not to issue a final verdict on their views, although along the way, it should be evident where my sympathies lie. Thus, the question is: based on the works of these scholars, how is African jurisprudence a challenge to the Eurocentric basis of jurisprudence? What intellectual contribution has African jurisprudence given to selected controversies in Western jurisprudence and jurisprudence in general? How and in what sense(s) can we qualify and quantify the place of African jurisprudence in the understanding of jurisprudential problems? What is the significance of African cultural jurisprudence to the separability-inseparability controversy in jurisprudence? And finally, in the relation between law and morality, what can we ferret from the tenets of African jurisprudence?

Significant approaches to the nature and definition of law necessitated the idea of distinct schools of thought in jurisprudence. Thus, if jurisprudential problems are conceptual in nature, then the search for the appropriate concepts describing the reality of law, it behoves us to conclude that differences between the schools of thought in jurisprudence are conceptually framed. Hence, what accounts for why the historical school of jurisprudence is different from positivism or realism could be the way concepts are formed, adopted and framed into the universe of law?

But then, it is interesting to know that concepts are not too innocent in the way they are used, and it is within the range of possibility that the concepts themselves are ideologically inclined such that their use is instrumental in nature. Therefore, if concepts and their usage create problems in jurisprudential discourse, it could be that what motivate controversies in jurisprudence are the ideological mindsets that underlie the concepts involved. And unlike the debate between rationalists and empiricists, in epistemology, which could be described as a family quarrel,⁵ the intellectual controversies between the schools of thought in Western jurisprudence have involved much of the incredible instances of ideological antagonisms and passionate exchanges⁶ which appear irreconcilable.

Again, it is not preposterous to contend that concepts are generated by experiences. Different experiences produce different concepts, and most concepts in jurisprudence have been produced, generated and created basically from experiences of social, moral and political life, philosophy of society that are Eurocentric in nature and substance. The same is reflected in the hordes of debates on the separability-inseparability controversies that can be said to be Eurocentric in nature meaning that, significantly, the dimension of the content of that debate centres on the way the relationship between law and morality has been viewed. It therefore follows that what jurisprudence has been fed with consist largely of debates informed by Eurocentric experiences.

The Eurocentric flavour of the separability-inseparability controversy suggests that both legal positivism and legal naturalism and their respective views on the relation between law and morality have been essentially distilled from the perspective and experiences of Europe. Legal positivism as a major school of thought in jurisprudence concentrates on the provision of not just an abstract theory of law but also one which can be regarded entirely as containing veritable elements of a pure science of law.⁷ Ronald Dworkin once described legal positivism as the ruling theory of law.⁸ Its importance in jurisprudence equals the historical jurisprudential importance of the school of legal naturalism which, going by the last two thousand five hundred years, has witnessed three significant phases, with their respective eclipses and revivals,⁹ and in the present dispensation, feminist jurisprudence making waves all over Europe and the Americas. Hence, "Since at least the time of Bentham and Austin," argues Wilfrid Waluchow, "positivism was the theory held, in one form or another, by most legal scholars. It was also arguably the (largely unarticulated) working theory of most legal practitioners."¹⁰

Yet, its ablest proponents are, in the major sense, not only scholars brewed and bred in the West, or scholars with the perception that jurisprudence foundationally emanated from the brilliant expositions and classical reasoning on matters of society envisioned by Greek philosophers¹¹ such as Socrates, Plato and Aristotle¹², but, some positivists, also, are scholars with questionable and controversial views that nothing of cerebral worth could be itemised in relation to the Black man's conceptual consciousness.¹³ It means, foundationally, positivism is imbued with traits of racism and racial consciousness. Thus, hermeneutically, if one cannot immediately understand the ideological frame and form of someone's action and thoughts, especially to its ideological rock-bottom analysis, the best clue is to explore the tendency and tenor of ideas inherent in their culture as a whole. Hence, the culture of Europe has always been the projection of superiority and the castigation of other cultures to the abyss of historical and intellectual abeyance¹⁴.

It is no doubt that legal positivism remains the most popular, controversial and easily misunderstood jurisprudential school in the last half of the twentieth first century.¹⁵ According to George Letsas:

Legal positivism – of which Hart was the major exponent – has been variously evolved and significantly refined in many respects and by many followers. But at the same time legal positivism shows signs of an excessive pluralism and a theoretical fragmentation of detailed analyses, so much that nothing we can say about legal positivism in general can be agreed to by all positivists. Inclusive positivists disagree with the exclusives and within each camp; they disagree with each other on the reasons why the opposite camp is wrong. .¹⁶

However, the value of contemporary legal positivism for jurisprudence may not be justifiably known if it is not contrasted with the very jurisprudential theory it was out to dethrone: legal naturalism. Thus, natural law thinking that dominated the eighteenth century was challenged basically by two dominant but contrasting jurisprudential and legal movements that emerged during the period in question.

The first was the Romantic Movement which emphasized the view that law incorporates a mystic sense of unity and organic growth in human affairs, and the view that every nation, historical period and civilization in the evolution of its jurisprudence is unique.¹⁷ The second movement was legal positivism, yet before Bentham, Hume had offered devastating criticism of natural law theory by recourse to the tenets of true empiricism. Hence, according to Hume, the validity of normative rules cannot be logically derived from objective fact since they are basically subject to individual interpretation. To this end, according to Hume, the entire field of jurisprudence will benefit if it limits its analysis to the idea of positive laws, since such laws are analyzable in terms of their ascertain ability and validity without recourse to subjective considerations.¹⁸ Thus, for Hume, morals are to be distinguished and held separate from positive laws.

It was then left for Bentham to work out the fine details of the Humean distinction between positive laws and morals. Thus, Bentham and Austin commenced the idea of legal positivism in a very entrenched set of arguments and attacks against the idea of natural law, describing the doctrine not only as nonsense upon stilts,¹⁹ fictitious in character, but equally as “the pestilential breath of fiction.”²⁰ From all indications, natural law had to be dethroned because it offered no rationalistic and scientific standard based on human advantages, pleasures and satisfactions. Bentham found this standard in the principle of utility.²¹ And again, Bentham’s attack of the naturalist thesis of in-separation consisted in that it was inimical to legal and social reforms.

In principal terms, the thesis of legal naturalism seems to be contained in the idea that there is an immutable, universal, absolute law of nature that directs the proper relations between men and among men.²² In short, these three primary features constitute the core of natural law theory. First, a duality of legal existence: positive law and natural law, second, positing a hierarchical relationship between the positive law that 'is' and the natural law that 'ought' to be, and third, abridgement of the gulf between 'what is' and 'what ought to be'²³.

But then, a careful analysis of the thesis of legal naturalism also shows that it is possible to read elements of inconsistent philosophical position on human nature in the works of some philosophers of naturalism owing to their background stance on racism.

For example, Locke's treatise on the existence of inalienable natural rights which establishes the natural equality of all men has been critiqued because John Locke himself wrote and acted in defence of slavery. Yet, his treatise contained the core values that legal naturalism was built upon. And correspondingly, Hegel, the German idealist, whose writing has been influential on the thesis of legal naturalism, was also very racially prejudiced in his conclusion about Africa.

All these only show one thing: the view that both positivism and naturalism and the jurisprudential worldview they subscribe to have been essentially Eurocentric in nature. What is Eurocentrism? It is the view that third world legal, economic, religious and familial structures are treated as phenomena to be judged by Western standards.²⁴ It is the characterisation of such structures as either underdeveloped or developing. The standard of such characterisation proceeds entirely from experiences emanating from Europe and nowhere else. Eurocentrism is the assumption of the role of the judge in that regard as culturally relevant, intellectually sound, noises of political poeticism, and economic advancement. Eurocentrism conveys the idea and feeling that one is superior by the itemisation of very curious and internally generated standard of assessment which often leaves no room for equal contribution of assessment techniques and standard. Eurocentric feelings are often harbinger of the false idea of racial superiority and the ideological mindset that are foundationally intestinal to its circulation.

While it may be true that the architecture of legal and socio-political discourses have been largely distilled from the experiences of Europe, however, it is equally true that no sound jurisprudential theory, generally acclaimed for the world, can be built only on the experiences that hail from Europe. Thus, a general theory of law or even of central problems of jurisprudence, such as the connection between law and morality, cannot be limited to an Eurocentric conceptual framework and be expected to be representative of the entire field of jurisprudence. And since jurisprudence is a general reflection on law, hence, a philosophical introspection concerning the nature of law, it means that contributions from other canonical, reflective works deserve to be mentored into the orbit of general jurisprudential discussions.

Yet, such problems are what have been termed the separability-inseparability controversies. The separability-inseparability controversy revolves around the exact relation between law and morality. The separability thesis, as advanced by legal positivists, refers to the idea that law and morality are not necessarily connected.²⁵ The opposing view to this contention is the inseparability thesis which is the view that law and morality are not conceptually, logically and necessarily separated and separable. In popular jurisprudential debates, the inseparability thesis is associated with the natural law school of jurisprudence. What each thesis stands for constitute, in essential terms, the history of contemporary jurisprudential disquisitions beyond the limit of this page.

In Western jurisprudence, the separability-inseparability theses constitute a very important debate and problem. Part of the significance its understanding rests on some very important clues to establishing the nature and status of law to man's political and social existence. Since the debate in Western jurisprudence is on-going and an unsettled one, it behoves us to consider contributions concerning the controversy by taking a cue from other legal experiences and cultures that are not strictly Anglo-American. In this case, we shall consider contributions from African jurisprudence.

African Jurisprudence

The African jurisprudence project is, from all indications, a latecomer to the jurisprudential scene. Essentially, it is a counterpart of the African philosophy project. However, the philosophical priority of Africa seems to be clearer in jurisprudential philosophy than in any other area of intellectual endeavour. This is because law reflected the imperatives of changing economic, political, and social circumstances. It is in this sense that Murungi regarded the nature of African jurisprudence to be dialogic in nature drawing in its trail as an existential implication.²⁶ Kwasi Wiredu corroborated this thesis when he contended that African jurisprudence and African philosophy are exercises in 'postcolonial soul-searching.'²⁷ Nkiruka Ahiauzu's observation on the possibility of African legal theory does not seem to run contrary to Murungi and Wiredu's conclusion on the nature of African jurisprudence since, for her, that possibility anchors on the question of identity.²⁸

As a latecomer to this contested terrain of ancient and modern speculation on the nature of law, African jurisprudence has had to grapple with varied and multifaceted problems in general jurisprudence. This explains the lacuna that exists in African jurisprudence when juxtaposed with the nature of Western jurisprudence, for instance. Regardless of the intellectual lacuna that tends to exist in African jurisprudence on traditional problems in general jurisprudence such as the relation between law and morality, however, analytical attention ought to be paid to the few African and non-African scholars such as Gluckman,²⁹ Adewoye³⁰ and Okafor³¹ who have in one way or the other hinted at or touched on the idea of law and morality, for instance, in African law.

Despite the fact that, in the words of Onwuejeogwu, “African law remains largely untouched,”³² these scholars have, in their respective ways, made distinguished analysis and defences of what they think the nature of the connection between law and morality in African jurisprudence is. It is in this light that we agree with Elias’ opinion that³³ even though African law is “an hitherto uncharted field of general legal theory,”³⁴ it can still be seen in the light of the “wider framework of general jurisprudence.”³⁵

Granted this postulate, it is contended that an unbiased discussion of the general chart of African legal theory may serve as a clue to the resolution of long standing problems in general jurisprudence. According to Elias, some of the points alluded to in the discussion of African legal theory “may serve the purpose of inducing re-assessment of some of the controversial subjects of accepted Western legal philosophy.”³⁶ In another light, Elias enthused that “current legal theory has yet to take full account of the African interpretation of the juridical problems with which law must grapple in given society. Thus, an intellectual adventure into African legal conceptions should enlarge our horizon, if it does not enrich our knowledge of the function and purpose of law in the modern world.”³⁷

Barotse Jurisprudence

One of the early treatments of the nature of African law, from which the relation between law and morality can be ferreted, was offered by Max Gluckman. Gluckman’s sufficient grasp of the African attitude to the idea of law and its conformity with the issue of justice, amongst the Barotse of Northern Rhodesia, which no doubt, is commendable. In the first place, law among the Barotse is sourced in customs, judicial precedents, legislation, equity, laws of natural morality and of nations, and good morals and public policy. And another source, quite different from constant emphasis in jurisprudential writing, is what Gluckman calls “natural necessities” which are laws or regularities operating in the environment and in human beings and animals.³⁸

Hence, a careful reading of Gluckman on the nature of Barotse jurisprudence shows that morality is foundational to the nature of law. This is what Gluckman calls “the laws of natural morality and of nations, and good morals and public policy.” Natural morality could thus be interpreted to mean principles or ideals of morality. Again, it could be interpreted to mean principles of natural rightness or wrongness, on the assumption, one could guess, that morality could be a natural property inherent in humankind, an instinctual kind of impulse which creates feelings of acceptance or rejection of what is either good or bad.

In a way, again, one could reason that natural morality means what one cannot do without in the eyes of the Lozi people. But then to emphasise what is meant, Gluckman added that such natural morality refers from good morals. Thus, an interrogation of Barotse jurisprudence shows a clear instance of a legal and philosophical system built around ideals of morality and justice. It can thus be deduced that Barotse jurisprudence is not at home to the separability thesis - the view that law and morality are separable.

In this kind of jurisprudence, it behoves us to contend that Bentham's advocacy for the thesis of separation based on the need to see "the precise issues involved and posed by the existence of morally bad laws" will be pointless in Barotse jurisprudence in the sense that separation is not what is needed to point them out. The indication of what morally bad laws are is sourced in the foundation of law, according to Barotse jurisprudence, which is the realisation that morality forms part of the nature and the foundation of law; and from this perspective, one may reasonably argue that law is not separable from morality.

In a further sense, when applied in Barotse jurisprudence, Austin's separation of what is and what ought to be is defeated, since the nature of law and its source collapse the moral into the legal. In fact, if our interpretation and reading of Barotse jurisprudence is right, the merit or demerit of law is never one or another thing since, *ab initio*, those merits or demerits are part of the nature of law. In this sense, both the existence of law and its evaluation are contained in what is called the nature of law. Thus, from the sources of law, the substance of Barotse jurisprudence runs counter to Austin's separation programme.

On a general note, for Gluckman, the dynamics of Barotse jurisprudence consists in maintaining the general principles of law while at the same time meeting with the demands for justice. In his words,

The pull and push of Barotse jurisprudence consists in the task of achieving justice while maintaining the general principles of law. This is clearly demonstrated in the fact that while at some time, the judges are compelled to go against their view of the moral merits of cases in order to meet the demand for certainty of law, on the other hand they try to vary the law to meet those moral merits.³⁹

From the reading above, it means the task of justice is demanding on law. Better still, it could be established that the principles of law in the actual sense is subject to the demands of justice. Moral justice is thus a prominent feature of Lozi law. Thus Barotse jurisprudence is built on the equation of the principles of law with the demands of justice wherein there is the struggle towards the attainment and achievement of justice when law is applied, and/or enacted. Hence, the principle of equation involved here is aspiratory in nature, and the principles of law and the demands of justice need not necessarily mean the same thing because their functioning is tailored towards the common good.

Thus, there is always a push towards the end of law which is defined as the achievement of justice. The principles and certainty of laws consist of what is, perhaps, written as judicial precedents or cases that have been decided while those written records are imposing, a request for certainty, that is not all that there is to Barotse jurisprudence; because the certainty of law, as indicated above, shows that a moral scrutiny or the varying of the law to meet the moral merits, will still need to be established.

Evidently the nature of the social thesis and the value thesis, looked at from the perspective of Barotse jurisprudence, will include as a matter of necessity, moral criteria. This is understandable if we accept the sources of law in Barotse jurisprudence to include the law of natural morality or good manners. However, exclusivist positivism, in obvious terms, will amount to a strange doctrine or jurisprudential position in Barotse legal system not for a charge of impossibility, but for the implausibility defined in relation to the fact that the nature of law derives from moral criteria.

In another instance, Gluckman wrote that judges in Barotse courts often see morality as very instrumental in the decision of cases. Thus, the moral dimensions inherent in a case, for the judges, can be said to be a saving grace in deciding those cases. In the words of Gluckman,

When the court comes to give its decision, the judges cannot consult accumulated and sifted statutes or precedents, or other records. The judges remember and cite those precedents which seem to accord with their moral judgment, and even incidents which never came to trial for the very reason that they exhibited moral behaviour.⁴⁰

Since morality is eminently infused into the nature of Barotse jurisprudence and the legal system in particular, we can establish the nature of morality and its place in the nature of the law of the Lozi. In consequence, it can be said at the outset that Lozi law is basically enmeshed in a kind of ethical network which makes it difficult to break law away from morality.

In other words, there is no legal concept in Barotse jurisprudence or Lozi law that has no corresponding ethical connotation. In his words, “I know of no concept of Lozi law which has not a high ethical implication... Therefore, to apply a law in any way at all to facts involves a process of moral selection from the evidence which is likely to condition the whole judicial process.”⁴¹

For Gluckman, Lozi law can, therefore, be described in general terms as “a body of very general principles relating general and flexible concepts (e.g. “you cannot sue your host if a fishbone sticks in your throat” – *volenti non fit injuria*), and partly a body of general statements about the relationships of social positions (e.g. if you leave the village you lose rights in its land; a son must respect and care for his father).”⁴² In this kind of jurisprudential framework, what then is the place of morality?

According to Gluckman, the role of morality in Barotse jurisprudence is threefold: the source role, the applicative role and the conscience-raising role. The source role explains the fact that morality is one of the important sources of law among the Lozi. Apart from this, morality provides a bridge to cover the gap between the law and the evidence of the facts of a case on the ground. To this end, it is like a bridge between facts and the law. And conversely, the applicative role implies that moral considerations guide the application of rules, laws and precedents for application. Thus, the presence of many rules in the body of laws are regulated by moral criteria, hence the application of a legal rule to a case in hand is based on the moral discretion of the judges. The third role refers to conscience raising considering that morality is one of the basis of the Lozi people’s awareness of the limit and regulation of the law. This refers to the fact that morality, as a part of the law, sensitises the people concerning what ought to be the proper limits of law. Moreover, it provides the basis of obligation towards the law.⁴³

If we accept Gluckman’s description of Barotse legal philosophy, the exclusivism of positivism will be considered displaced since moral criteria feature prominently. This kind of system upturns Bentham’s model the other way, because for Bentham, it does not mean that law ought not to have a moral content but that a moral content is not a necessary ingredient, prerequisite or property of law; but for Lozi jurisprudence, laws do not just have a moral content, yet morality, from all indications, is a necessary property of law. Lozi laws are thus the invention of laws in terms of morality. Barotse jurisprudence, by its account of law in morally-defining terms, falsifies, in empirical terms, exclusivist’s hypothetical claim on the social thesis and value thesis. Therefore, what was needed to falsify the claim of exclusive positivism is just the existence of a system of laws which depends and is regulated by moral criteria, and the truth is that Barotse jurisprudence is an empirical instance, if not a conceptual one, in which moral considerations serve as the criterion of legal validity, thus falsifying and reducing exclusive positivism to absurdity. But then, it is also clear that experiences generate concepts.

The conclusion is that, the analysis of Gluckman on the nature and ideas of Barotse jurisprudence, the relation between law and morality in the canons of African jurisprudence may not be rendered in positivistic terms. In other words, Barotse jurisprudence is completely at odds with positivism, and the social and values these are crudely negated when interpreted in light of Barotse jurisprudence. In this negative sense, the separability thesis, for Barotse jurisprudence is not only implausible, but it is also not in tune with empiricism.

But then, one critical defect of Gluckman's anatomy of Barotse law is that it is rendered in much diffused manner such that one is not too clear about the conceptual parameter to use it in organising and establishing the concept of law. Almost all kinds of legal excesses or, on the other hand, legal flexibilities are allowed into the schema of law. In the end, it appears that what is considerably law is dulled by interjections of many kinds which has the tendency of blurring what the nature of law is in general. This is why it can be stated that Lozi law is only law externally but not internally. In other words, since many conceptual parameters are brought to bear in the definition of Lozi law, what may be left as a statement of law may end up being law only in name, but not in concept or principle?

But more importantly, as noted by Freeman, Gluckman's analysis of Barotse jurisprudence is only a revelation, in practical terms, of recent attempts and growing consciousness towards a side-stepping of definitional questions in jurisprudence. The limitation of this model of accounting for the nature of law is informed by the fact that it becomes merely an obsession with the analysis of procedures, strategies and process. In the words of Freeman, "the study of substantive concepts and rules is of secondary importance and no real attention is given to definitions of laws."⁴⁴ And in the same vein, Freeman is of the opinion that, in searching for adequate categories, Gluckman may be regarded as a cultural solipsist.

In a sense, Freeman may be right in his critique of Gluckman's account of Barotse jurisprudence. Sometimes, there is the tendency to regard a culture's jurisprudence, such as Barotse jurisprudence, as sufficient in itself to capture the salient ideas of jurisprudence and legal concepts. Thus, one ends up swimming in the limitations of a culture's jurisprudence. However, what is necessary and needed is to subject even the main ideas in a culture's jurisprudence to the conceptual parameters excellently identified and accepted as a body of truths in mainstream or general jurisprudence.

But then, while we accept the assessment of Freeman in this direction, it does not, however, distort the importance of making a cultural contribution to general jurisprudence. Law is not just an attribute of human corporate existence; nor is it a rigidly abstract notion. Law reflects itself also as a cultural phenomenon admitting in its trail the characteristics of cultural distinctions. Howes contended that “cross-cultural jurisprudence is essentially an exercise in hybridization – in *crossing* cultures – and there is nothing “transcendent” about either its methods or its results which involves seeing (and hearing) the law of any given jurisdiction from both sides, from within and without, from the standpoint of the majority and that of the minority, and seeking solutions that resonate across the divide.”⁴⁵ In the words of Nicholas Kasirer, cross cultural jurisprudence “involves stepping out of “Law's empire” (if only temporarily) and attempting to find some footing in “Law's cosmos”.”⁴⁶

Igbo Jurisprudence

Fidelis Okafor represents one of the African legal philosopher whose work and analysis on African law and jurisprudence is worthy of commendation. One significant contribution of Okafor's work is the demonstration of the unsuitability of legal positivism for the African conundrum. Writing from the perspective of the Igbo ethnic group in south east Nigeria, the demonstration of the unsuitability of legal positivism for African legal culture, according to Okafor, is multifaceted. In the first place, positivists' assertion that valid laws emanate only from the sovereign, the state, the legislative authority, from social sources or facts, is a point of critique of legal positivism. In his words:

*If political sovereignty is the only legitimate source of valid laws, there is no doubt that customary law; canon law, positive international law as well as other legitimate legal phenomena is in serious danger. The legal phenomena in the Igbo country are opposed to the spirit and tenet of legal positivism... They have no standing constituted legislative authority as such either. The people themselves, the “Oha” are the sovereign authority and the legislative authority rests on them. With the sovereign authority invested on the “Oha” and the legislative powers entrusted on no special group to the exclusion of other groups, the dangers of legal authoritarianism and tyranny are forestalled and eliminated.*⁴⁷

In the second place, Okafor contended that positivists' doctrine of enforceability is also antithetical to the heart and substance of African jurisprudence since the definition of law is not just conceivable only in terms of enforceability. According to Okafor, to restrict the conception of valid laws to its enforceability is to reduce the anatomy and contour of law and jurisprudence to one of force. In the words of Okafor,

*Enforceability is an essential element in the positivists' definition of law...This means that laws must be backed by a coercive force. The contrary is the case in the Igbo traditional setting. The Igbo positive laws, because of their religious and moral import bind the individuals in conscience inferno. Sanctions rather than force applied to ensure obedience to the laws. And this is why the Igbo had no real need for standing law enforcement agents.*⁴⁸

The most glaring aspect of the unsuitability of legal positivism in relation to Igbo jurisprudence, according to Okafor, has to do with positivists' separation of law from morality. Writing from the Igbo perspective, Okafor's claim is that "the Igbo positive laws, together with their legislative and judicial methods ...are inseparably bound with their religion; morality, in this picture, stand as a challenge to legal positivism."⁴⁹ Thus, from a religious and moralistic point of view, the positivist' separability thesis is, in obvious terms, untenable and unworkable. It is an unrealistic view about the nature of law, considered strictly from the ontology of the Igbo people. This ontological worldview, according to Okafor, is in superlative terms incongruent with positivists' empiricism. Okafor's work is replete with many instances of the rejection of the agenda of separating a people from their ontology in terms of law that will regulate their lives.

In one such instance, Okafor contended that:

*For a piece of legislation to qualify as law in the Igbo traditional setting such a piece of legislation must be seen as morally right and just – and of course must be known as proceeding from the will of the people...Legal positivists erred not only in their separation of morality from positive laws but also in their claim that the sovereign or a constituted legislative authority is the only source of valid laws.*⁵⁰

In another instance, Okafor decried positivists' separation thesis in the sense that it breeds injustices in the canons of the law. In his words,

The legal positivist is not in any way bothered by what the law ought to be. Right or wrong, it does not matter so long as the law bears the stamp of authority. Thus, it is the formal stamp of technical legality on a given norm and not its ethical content or moral soundness that is the criterion of legal validity. It is thus clear that legal positivism separates ethics from jurisprudence, divorces morality from positive law and makes the will of the legislative organ the only source of law, as it severs the legal "is" from the legal "ought".⁵¹

According to Okafor, only a law with an ontological foundation would be a law of the people, by the people and for the people.⁵² The ontological foundation of African law is discernible in its moral foundation. In this penetrating comment, Okafor submits that:

The province of African jurisprudence is thus large enough to include divine laws, positive laws, customary laws, and any other kinds of laws, provided such laws are intended for the promotion and preservation of the vital force.... What is considered ontologically good will therefore be accounted as ethically good; and at length be assessed as juridically just?⁵³

A critical and careful reading of Okafor's conclusion seems to suggest that the nature and province of African jurisprudence, in particular Igbo jurisprudence, is unbridgeable. At the same time, it follows that the nature of Igbo jurisprudence is conceptually indefinable and uncertain since it incorporates almost all kinds of prism in which law can be understood. But then, a jurisprudence that is unbridgeable in this sense appears to be no jurisprudence at all. It is like saying anything goes, thus an anything-goes-jurisprudence is ideologically unhelpful and metaphysically abstruse.

But more importantly, Okafor's critique of the separability thesis is essentially flawed in some detailed respects. For instance, what is Okafor's conception of legal positivism? Legal positivism for Okafor is the attitude of mind and spirit which regard as valid laws only when such enforceable norms formally enacted or established by the appropriate official political organ.⁵⁴ It is obvious that Okafor's conception of legal positivism is narrow in scope, in the sense that it only takes up a critique of the separability thesis in the weakest Austinian or Benthamite senses.

Hence, Bentham and Austin's separability theses is anchored on the idea of sovereignty and the limitations that those conceptions drew have been transcended by modern discussions of legal positivism. To have limited his analysis of legal positivism; and to the Benthamite and Austinian versions is to create a kind of straw man.

Notwithstanding, the inherent ambiguity of positivists' separability doctrine, Okafor's reading of legal positivism in the age of the distinction between exclusivism and inclusivism, is an incomplete representation of legal positivism. At best, Okafor's position would be better understood if he had defined the nature of the version of legal positivism he was challenging. This is especially so in view of the fact that Okafor's *Igbo Philosophy of Law*⁵⁵ was written at a time when it was not too remote from the contribution of H.L.A. Hart to legal positivism and the many other discussions that Hart's conceptual clarification of legal positivism has made possible for modern jurisprudence. And according to Hart, it is possible to reject Austin's brand of legal positivism without vitiating the veracity and validity of the separability thesis.

Yoruba Jurisprudence

Omoniyi Adewoye has provided a perspicuous analysis on the nature of Yoruba jurisprudence (the Yoruba people inhabit the south-Western part of Nigeria). Adewoye's treatment of the relation between law and morality is neither substantial nor specific, hence it is only a tangential rather than a direct focus. Unlike Okafor's clear-cut, focussed and insightful attack on the positivists' separability thesis in Igbo jurisprudence, what can be credited to Adewoye via Yoruba reflections is the relation between law and morality with a direct focus on the jurisprudential significance of Yoruba proverbs and only an incidental indication of what the Yoruba philosophical attitude on the separability thesis is likely to be. What then is this picture of the relation between law and morality in Yoruba jurisprudence?

In the primary sense, Adewoye contends most seriously that "law in the traditional Yoruba society cannot be divorced from the moral milieu in which it operated...law in the Yoruba society derives its attributes from this moral milieu. It is this milieu which also endows law with an authority sufficient to dispense with the mechanics of enforcement."⁵⁶ Three vital ideas, in connection with the relation between law and morality, can be discerned in Adewoye's discussion of Yoruba jurisprudence. These ideas, in our understanding, can be rendered in the following terms as the marriage or union thesis, origin or source thesis and the enforcement thesis.

First, there is the union or marriage thesis. But then, what kind of union can be ascribed to the relation between law and morality? For Adewoye, Yoruba jurisprudence presents an un-divorceable relation between law and morality. In another sense, the picture we get is that law is necessarily drawn in partnership with morality and this appears understandable, if it is true that law will have to operate in a moral environment. Given the prevalence of a moral environment in which law will have to operate, the deduction is that law and morality are inseparable. Thus, an inseparable union is found to exist between law and morality.

The question to ask for intelligible discussion is whether law necessarily operates in a moral environment. In actual fact, the question to ask is what constitutes a moral environment? Can it be the structures, attitudes or beliefs of the people of a society? Are there specific features of a moral environment? If there are, what are the features of Yoruba moral environment? These are questions that make Adewoye's discussion of law and morality in Yoruba jurisprudence worthwhile.

Second, Adewoye's position tends to elicit the source or origin thesis. In this case, Yoruba jurisprudence posits a union thesis on law and morality just in case it is acceptable that law derives indeed from morality. In other words, it shows that law is sourced in concepts and ideals of morality. The attributes of law are not independent of moral values. In this case, also, one can be led to the tentative conclusion that law and morality are inseparable. If something is the source of another, it only shows that its existence is defined in relation to its source. Law, in this case, is founded on and intricately connected to morality.

The third thesis concerning Adewoye's position on the nature of Yoruba jurisprudence is what we have called the enforcement thesis. Unlike the positivists' conception of enforceability, the Yoruba notion of enforceability has nothing to do with force or even sanctions. What it means is that law becomes unenforceable and meaningless when its moral import is jettisoned. It could also mean that law receives its sense of obligation when rendered and evaluated in a moral sense. Legal obligation, in this sense, is reduced to moral obligation. In other words, to be legally obligated is to be morally persuaded about the moral possibilities of the law.

Therefore, to contend that a moral milieu endows law with an authority sufficient to dispense with the mechanics of enforcement shows that what is strictly legal without a moral authority is strange jurisprudence. The implication of this position is that the separability thesis becomes un-entertain-able in Yoruba jurisprudence. Further implication of this position on jurisprudence in general is obvious, and it will take a conceptual platitude on which this can be discussed in essential details.

And even though this idea about law and morality appears very useful and significant, it nevertheless does not establish the relationship between law and morality from a distinct perspective derived from a relevant theory of law regardless of how elementary or unsophisticated that theory of law may be interpreted. And what is more, it appears the kind of jurisprudence that Adewoye had in mind is depicted in the philosophical utility of proverbs which is what validates our assertion that Adewoye's emphasis on the nature of law in Yoruba society is conspicuously tied to the conceptual elucidation of proverbs in Yoruba philosophy.

The significance of the proverbial model is no doubt, intellectually helpful for African cultural worldview in view of the imposing resurgence of the scientific and empirical wave in global philosophy. Arguing for the scientific context of African proverbs, Kwame Gyekye observed that African proverbs not only bear philosophical contents but also products of the mental, scientific alertness of the African concerning events, situations and experiences of the lives of the people.⁵⁷

The scientific aspect of African proverbs notwithstanding, our position and argument is that Adewoye's painstaking analysis of Yoruba jurisprudence from the eye of proverbs is only a partial truth not the whole truth. In fact, apart from proverbs, many other indices and expressions of Yoruba social and cultural life are significant in pointing out the nature of Yoruba jurisprudence.

As clarified by Sobande, three points of wisdom were the constituents of both traditional and modern Yoruba society. The first wisdom is law or commands, i.e. *Ase*; the second wisdom is culture as reflected in social practices, i.e. *Asa*; and the last wisdom is taboo, i.e. *Eewo*. Hence, *Ase* is the reflection of the king's command or the directives of the government which are believed to be unbreakable. Furthermore, these points of wisdom are either formally or informally portrayed in practices and actions that are commonplace in the society.⁵⁸

The idea of law in Yoruba society is displayed and portrayed in cultural festivals and social dances. In most cases, these laws are not written down but are believed to be registered and written in the collective memory and consciousness of all and sundry in the relevant society. That is why some scholars have argued that an average African society is said to be heavily communal. The absence of written forms of law furthers the communal feelings and belongingness such that anyone trying to break the law is often helped and warned by fellow citizens of that political or social group.⁵⁹

From this it shows that proverbs alone are not the only indices of Yoruba jurisprudence but, significantly, this jurisprudence is reflected in their art, songs, artefacts, even speculative stories about the universe and life are all of primary importance in establishing Yoruba jurisprudence. Yet, what is begging for analysis as part of Yoruba jurisprudence is a total and comprehensive picture of the nature of law in Yoruba philosophy?

Conclusion

In summary, a holistic construct of the nature of African jurisprudence, as seen from the perspectives of Barotse culture, Igbo culture and Yoruba culture, on the separability – inseparability controversy, tends to assume that the separability thesis advanced in Western jurisprudence by legal positivists is a misnomer, at least as far as those cultures under considerations are concerned. The ground for that contention is contained in the fact that moral considerations, factors and values tend to form part of the nature of law and the character of the legal systems in those cultures.

Even though the above, these existing positions is plagued in one form or the other with certain inherent flaws, the general conclusion emanating from this cultural standpoint is the view that separation of law from morals is an impossibility and an implausibility in as much as laws derive their validity from the moral milieu that pervades the operation of law.

Hence, Okafor anchored the prominence of the inseparability of law from morality in Igbo culture based on the ontological philosophical worldview entertained by the Igbo people, ontology with a moral foundation. And conversely, on his part, Gluckman contend that the inseparability of law from morals derives not just because morality is one of the sources but also from the argument that no legal concept or rule exists in Barotse jurisprudence without an ethical implication or dimension.

And third, in the same view seems to be implicit in Adewoye's position on Yoruba jurisprudence which asserts the view that law derives from morality. However, there is the need for a conceptual interpretation of the position of these authors. Therefore, this conceptual interpretation will further show the basic flaws inherent in their formula and how it is, perhaps, inadequate to actually answer some of the penetrating arguments of legal positivists on the separability thesis. Thus, in our view, an endorsement of conceptual complementary ideals with respect to the relation between law and morality, if carefully understood, will serve as an adequate challenge and critique of the positivists' separability thesis.

Endnotes

¹ Professor Trevor-Roper was an Oxford Historian who, in 1962, condemned the whole of Africa to the blackness of darkness forever. In his famous words, “*Perhaps, in the future, there will be some African history to teach. But at present there is none: there is only the history of Europeans in Africa. The rest is darkness...and darkness is not a subject of history.*” *Rise of Christian Europe* (London: Thames and Hudson, 1964), p. 9.

² Andrew Foote in 1854 before the American Colonization Society remarked that “If all that Negroes of all generations have ever done were to be obliterated from recollection forever the world would lose no great truth, no profitable art, and no exemplary form of life. The loss of all that is African would offer no memorable deduction from anything but earth’s BLACK catalogue of crimes.” *Africa and the American Flag* (New York, 1854), p. 207. The foundation of this perception, Olufemi Taiwo has argued, can be traced to the Hegelian ghost pervading and roving all around the western hemisphere, shaping and influencing perception about the southern hemisphere especially Africa. In this regard, the "West" presents itself as the embodiment and inventor of the "universal," Hegel is dead! Long live Hegel! The ghost of Hegel dominates the hallways, institutions, syllabi, instructional practices, and journals of Euro-American philosophy. The chilling presence of this ghost can be observed in the eloquent absences as well as the subtle and not-so-subtle exclusions in the philosophical exertions of Hegel's descendants. The absences and exclusions are to be seen in the repeated association of Africa with the pervasiveness of immediacy, a very Hegelian idea if there be any. See Taiwo, O. “Exorcising Hegel’s Ghost: Africa’s Challenge to Philosophy” in *African Studies Quarterly*, Vol. 1, Issue 4, 1998, <http://www.clas.ufl.edu/africa/asq/legal.htm>.

³ Recent archaeological discoveries by the Leakey’s in 1959 of *Zinjanthropus* reveals that Africa was the Garden of Eden and the cradle of human civilization, that the first *homo sapiens* in Europe was the migratory Negroid who entered Europe through the Iberian peninsula rather than from the East. See Diop, C. A., *Civilization or Barbarism*, (New York: Lawrence Hill Books, 1991, p. 40.

⁴ Taiwo, O. “Exorcising Hegel’s Ghost: Africa’s Challenge to Philosophy” in *African Studies Quarterly*, Vol. 1, Issue 4, 1998, <http://www.clas.ufl.edu/africa/asq/legal.htm>.

⁵ Robert C. Solomon and Kathleen M. Higgins, *A Short History of Philosophy*, New York: Oxford University Press, 1996, p. 198.

⁶ For a stimulating instance, see the Hart-Fuller Debate: Hart, H.L.A. "Positivism and the Separation of Law and Morals" in *Harvard Law Review* Vol. 71 (1958); Fuller, L.F. "Positivism and the Fidelity to Law - A Reply to Prof. Hart" in *Harvard Law Review*, Vol. 71 (1958): 630 - 672.

⁷ Legal positivists especially of the remote past were fond of classifying their various attempts at establishing the nature of law in scientific terms. Thus, Austin contended that his legal theory was scientific. In the same vein, Bentham considered his positivism based on the principle of utility to be an entirely provoking scientific system of law, appropriating Newtonism in the ethical and legal world. Hart also contended that his legal theory is a mere descriptive analysis of the nature of law. According to Bix, to achieve a morally neutral status for legal theory may be difficult if such a descriptive science is taken to mean that there is no evaluation of the data collected. See Bix, B. "Legal Positivism" in *The Blackwell Guide to the Philosophy of Law and Legal Theory*, Malden, Massachusetts: Blackwell Publishing Limited, 2005, p. 33. Such a descriptive science has been described by John Finnis as "a conjunction of lexicography with local history". See Finnis, J. *Natural Law and Natural Rights*, Oxford: Clarendon Press, 1980, p. 4.

⁸ R. Dworkin, *Taking Rights Seriously*, 2d ed. (Cambridge: Harvard University Press, 1978) at vii.

⁹ Arnold Brecht *Political Theory The Foundations of Twentieth Century Political Thought*, Delhi: Princeton University Press and Surjeet Publications, 1989, p. 138.

¹⁰ Waluchow, W. "The Many Faces of Positivism" in *University of Toronto Law Journal*, XLVIII, No. 3, 1998, p. 1.

¹¹ The falsity and unsoundness of this conclusion on the foundation of philosophy and jurisprudence has been a subject of controversy. But that controversy has been laid to rest by series of discoveries which shows that philosophy and jurisprudence had their historical foundations in Africa. According to Will Durant, "Historians of philosophy have been wont to begin their story with the Greeks. The Hindus, who believe that they invented philosophy, and the Chinese, who believe that they perfected it, smile at our provincialism. It may be that we are all mistaken; for among the most ancient fragments left to us by the Egyptians are writings that belong, however loosely and un-technical, under the rubric of moral philosophy. The wisdom of the Egyptians was a proverb with the Greeks, who felt themselves children beside this ancient race."

See Durant, W. Durant, W. *Our Oriental Heritage*, New York: Simon and Schuster, 1954, p. 193. That jurisprudence also had its foundation in Africa has also been proved by Father Onyewuenyi in a thought provoking research. According to Father Onyewuenyi, “that the Egyptian System originated the legal system or jurisprudence is clearly attested to by the early Greek philosopher and historian Isocrates whom Martin Bernal describes as the “outstanding spokesman of Panhellenism and Greek cultural pride.”” See Onyewuenyi, I. C. *The African Origin of Greek Philosophy: An Exercise in Afrocentrism*, Nsukka, University of Nigeria Press, 1993, p. 54.

¹² Even though it is no exciting news, nevertheless, it is true that Aristotle was in a very sensitive and passionate sense a racist. In his famous treatise on the justification of inequality and slavery, Aristotle argued that Barbarians (BLACKs) were devoid of reason but full of emotion and as such was meant to be slaves. The absence of reasoning capacity in some humans is a justification of natural inequality amongst men. See Thomas K. Lindsay, Was Aristotle Racist, Sexist, and Anti-Democratic? *The Review of Politics*, Vol. 56, No. 1 (Winter, 1994), pp. 127-151.

¹³ Take, for instance, David Hume a major and important figure in the positivists’ family. Hume’s philosophy influenced Jeremy Bentham, and by inference, John Austin, who was a disciple of Bentham. Hume reasoned that Negroes were not inferior to whites and that nothing of eminence in terms of speculation, art nor scientific inventions could be said about them. See David Hume, *Philosophical Works*, vol. 111, pp. 228-229; Morton, Eric, “Race and Racism in the Works of David Hume” (*Journal of African Philosophy* 1, 1, 2002). The same can be said of Thomas Hobbes, another notable legal positivist who gave wonderful defense of colonialism in his exegetical treatise. See the following for apt references Hobbes, T. (1996). *Leviathan*. J. C. A. Gaskin (ed.). New York, NY: Oxford University Press; Hobson, J. A. (1965). *Imperialism: A Study*. New ed. Ann Arbor, MI: University of Michigan Press; Cheedy Jaja, “Hobbes's Theory of Colonialism and the African Colonial Experience: Structural and Programmatic Affinities” in *APA Newsletters*, Volume 97, Number 2 (Spring, 1998).

¹⁴ The literature on physical, philosophical and political anthropology is replete with this underestimation of Africa and the overestimation of Europe. Based on differences in visual images, the distancing of Africa from the rest of humanity was phenomenally widespread. Bernth Lindfors was apt to say that “throughout Europe native Africans were stereotyped as brutish, dimwitted, naïve, emotional, undisciplined, uncultured – in short, children of nature who needed to be civilized and domesticated...they were regarded not just as social and intellectual inferiors but as breed apart, a throwback to earlier evolutionary times, a rudimentary link in the great chain of humanoid beings...” Bernth Lindfors, “Hottentot, Bushman, Kaffir The Making of Racist Stereotypes in 19th- Century Britain” in *Encounter Images in the Meetings between Africa and Europe*, edited by Mai Palmeg, Uppsala: Nordiska Afrikainstitutet, 2001, pp. 54, 61.

¹⁵ See Brian Bix, “Legal Positivism” in *The Blackwell Guide to the Philosophy of Law and Legal Theory*, Malden, Massachusetts: Blackwell Publishing Limited, 2005, p. 29. “While in some circles, legal positivism now seems the dominant approach to the nature of law, this dominance, opines Brian Bix, has never meant that the approach was without critics.”

¹⁶ Letsas, George “H. L. A. Hart’s Conception of Law” in *UCL Jurisprudence Review 2000*, p. 187.

¹⁷ M. D. A. Freeman *Lloyd’s Introduction to Jurisprudence*, Sixth Edition, London: Sweet and Maxwell, 1994, p. 783.

¹⁸ This view is contentious, contextual and controversial. Feminist, for instance, take positive laws in present human societies as a reflection of male values and dominance. For scholars such as Ann Scales, Sandra Bartky, Catherine Mackinnon, objective reality is a myth and so also every institution based on it. Law, for Scales, is not a reflection of objectivity but the subjective worldview, rationalization and orientation of the law makers. See Ann Scales, “The Emergence of Feminist Jurisprudence An Essay” in *Yale Law Journal*, 95, p. 1051.

¹⁹ Bentham, J. *Anarchical Fallacies*, Works, vol. 2, p. 501.

²⁰ Bentham, J. *Fragment on Government*, pp.100-101.

²¹ Bentham, J. *A Fragment on Government*, edited by Wilfrid Harrison. Oxford: Basil Blackwell, 1948, p. xx.

²² According to D'Entreves, the difficulty in understanding the notion of natural law stems basically from the fact that what constitutes "nature" in the sense in which natural law is used appears to be the main problem. In his words, "many of the ambiguities of the concept of natural law must be ascribed to the ambiguity of the concept of nature that underlies it." See D'Entreves, *Natural Law*, (rev. ed.), 1970, p. 16.

²³ See Olufemi Taiwo, *Legal Naturalism - A Marxist Theory of Law* (New York: Cornell University Press, 1996) pp. 37 - 38.

²⁴ Mohanty T. Chandra, "Under Western Eyes: Feminist Scholarship and Colonial Discourses" in *Third World Women and the Politics of Feminism*, edited by Chandra, M. T. Bloomington: Indiana University Press, 1997, p. 71.

²⁵ Some legal positivists prefer the term 'separation thesis' while some stick to the conventional name 'separability thesis'. This is what Waluchow terms the conceptual version of what legal positivism is. Sometimes, one is tempted to conclude that both are the same thing. While this general disposition is maintained and accepted, in its particular materiality, this kind of general disposition may be unhelpful in displaying the differences of positivistic attitudes towards the meaning of the thesis. The separation thesis is championed by exclusive legal positivists while the separability thesis is advocated and held by inclusive legal positivists. According to Jules Coleman, the questions that both theses pay attention to are different in terms of their logical strength. The separation thesis entails the question of whether law and morality are necessarily separated. The separability thesis entails the question whether law and morality are not necessarily connected. See Coleman, J. "Authority and Reason" in *Autonomy of Law Essays on Legal Positivism* ed. Robert P. George Oxford: Clarendon Press, 1996, p. 290. Suffice it to say, however, that both involve a concise and concrete positivist position on the relation of law with morality. According to Waluchow, whether, as a matter of conceptual necessity, these internal criteria can ever make reference to morality, and therefore be moral criteria, is what separates the two conceptual versions of legal positivism. Waluchow, W. "The Many Faces of Positivism" *University of Toronto Law Journal*, XLVIII, No. 3, 1998, p. 6.

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- ²⁶ Murungi, John “The Question of African Jurisprudence: Some Hermeneutic Reflections” in *A Companion to African Philosophy*, Edited by Kwasi Wiredu, Malden Massachusetts: Blackwell Publishing Limited, pp: 519-526, 2004.
- ²⁷ Kwasi Wiredu, ‘African Philosophy in Our Time’ *A Companion to African Philosophy*, Kwasi Wiredu (ed.) London: Blackwell, 2004, p. 1.
- ²⁸ Nkiruka Ahiauzu, ‘Ubuntu and the Obligation to Obey the Law’ *Cambrian Law Review*, Vol. 37, 2006, p. 19.
- ²⁹ Max Gluckman, *Order and Rebellion in Tribal Africa* chp. 7, London: Cohen and West, 1963.
- ³⁰ Adewoye Omoniyi, “Proverbs as Vehicle of Juristic Thought Among the Yoruba” in *Obafemi Awolowo University Law Journal*, January & July 1987.
- ³¹ F. U. Okafor, “Legal Positivism and the African Legal Tradition” in *International Philosophical Quarterly*, No. 2, Issue No. 94, June 1984.
- ³² Onwuejeogwu, M. A. *The Social Anthropology of Africa*, Ibadan: Heinemann Educational Books, 1992, p. 116.
- ³³ See T. O. Elias, *The Nature of African Customary Law*, Manchester: Manchester University Press, 1956.
- ³⁴ Elias, *The Nature of African Customary Law*, p. 4.
- ³⁵ Elias, *The Nature of African Customary Law*, p. v.
- ³⁶ Elias, *The Nature of African Customary Law*, p. 6.
- ³⁷ Elias, *The Nature of African Customary Law*, p. 6.
- ³⁸ Gluckman, M. *Judicial Process among the Barotse*, Manchester: Manchester University Press, 1967, p. 231.
- ³⁹ Max Gluckman, *Order and Rebellion in Tribal Africa* chp. 7, London: Cohen and West, 1963, p. 198.

⁴⁰ Ibid. p. 234.

⁴¹ Ibid. p. 259.

⁴² Ibid. pp. 325-326.

⁴³ Ibid. p. 259.

⁴⁴ Freeman, M.D.A. *op. cit.*, p. 793.

⁴⁵ David Howes, "Introduction: Culture in the Domains of Law" in *Canadian Journal of Law and Society / Revue Canadienne Droit et Société*, 2005, Volume 20, no. 1, pp. 9-29, at p.10.

⁴⁶ Nicholas Kasirer, "Bijuralism in Law's Empire and in Law's Cosmos" (2002) 52 J. Legal Educ. 29.

⁴⁷ Okafor, F. U. *Igbo Philosophy of Law*, Enugu: Fourth Dimension, 1992, pp. 90-91.

⁴⁸ Okafor, F. U. *Igbo Philosophy of Law*, Enugu: Fourth Dimension, 1992, pp. 91-92.

⁴⁹ Okafor, F. U. *Igbo Philosophy of Law*, Enugu: Fourth Dimension, 1992, p. 90.

⁵⁰ Ibid. p. 91.

⁵¹ Ibid. p. 90.

⁵² F. U. Okafor, "Legal Positivism and the African Legal Tradition" in *International Philosophical Quarterly*, No. 2, Issue No. 94, June 1984, p. 163.

⁵³ F. U. Okafor, "Legal Positivism and the African Legal Tradition" in *International Philosophical Quarterly*, No. 2, Issue No. 94, June 1984, p. 163.

⁵⁴ Okafor, F. U. *Igbo Philosophy of Law*, Enugu: Fourth Dimension, 1992, p. 90.

⁵⁵ Okafor's work was published in 1992. This work did not even consider legal positivism from the point of view of H. L. A. Hart whose work has been a catalyst to the discussion on the division between hard positivists and soft positivists and the many other extensive treatments of the controversy on the separability thesis.

⁵⁶ Adewoye Omoniyi, *op. cit.*, p. 3.

⁵⁷ Gyekye, K. *Tradition and Modernity A Philosophical Reflection on the African Experience*, New York: Oxford University press, 1997, p. 242.

⁵⁸ Sobande, A. "Eewo" in Oludare Olajubu, ed., *Iwe Asa Ibile Yoruba* Ikeja: Longman Nigeria, 1978, p. 23.

⁵⁹ Idowu, W. "African Philosophy of Law: Transcending the Boundaries between Myth and Reality" in *Africa: Myth and Realities, Enter-text Journal*, pp. 52-93.