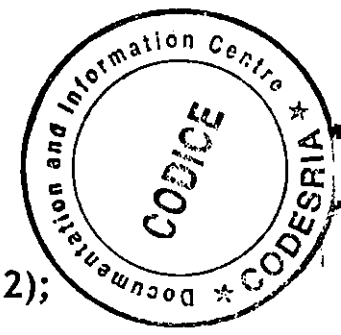
Thesis by
IDOWU, William Oluwunmi O

Department of Philosophy, Obafemi Awolowo University, Ilelfe, Nigeria

A Critique of the Separability Thesis in the Context of an African Jurisprudence

2009

A CRITIQUE OF THE SEPARABILITY THESIS IN THE CONTEXT OF AN AFRICAN JURISPRUDENCE



WILLIAM OLUWUNMI O. IDOWU
B. A. PHILOSOPHY (FIRST CLASS HONS.) (IFE, 1992);
M. A. PHILOSOPHY (IFE, 1998)

Being a thesis in partial fulfilment of the requirements for the award of the Degree of Doctor of Philosophy in Philosophy (PhD)
Department of Philosophy, Obafemi Awolowo University, Ile-Ife, Nigeria

2009

CERTIFICATION

This is to certify that this project, titled "A Critique of the Separability Thesis in the Context of an African Jurisprudence" was carried out under our supervision by William Oluwunmi Oladunni Idowu.

.....

Dr. Moses Oke
Supervisor
Department of Philosophy
Obafemi Awolowo University,
Ile-Ife, Nigeria.

.....

Dr. Ademola Popoola
Co-Supervisor
Department of International Law,
Faculty of Law,
Obafemi Awolowo University,
Ile-Ife, Nigeria.

DEDICATION PAGE

This research work is dedicated to the following people who have in one way or the other made a tangible impact on my life.

TO: COUNCIL FOR THE DEVELOPMENT OF ECONOMIC AND SOCIAL RESEARCH IN AFRICA (CODESRIA) for its uncompromised support of intellectual research in Africa and for supporting this research work with a research grant.

To Dr. Daniel Kolawole Olukoya, who taught and exposed me to the art of spiritual warfare and the principles of Takuology.

To Pastor William Folorunsho Kumuyi, who taught me how to dissect, handle and appreciate the principles and the power of the Written Word of God and the beauty and glory of righteousness.

To Pastor Enoch Adejare Adeboye, who taught me, early in my spiritual life, the beauty of secret and close communion with the Father of Light, in whom there is no variableness neither the shadow of turning.

To Pastor Abel Asiagwu, whose instincts for revival in the Church of Jesus Christ is commendable and affective, whose understanding and knowledge of the state of the Church is revealing and revolutionary, whose life of faith and foolishness for Christ' sake is cerebrally incomprehensible but eternally celebrative, who taught me the essence of commitment, consecration and the utility of a life of obedience unto God.

To Pastor Dapo Orisakeye, who led me to the fullness, force and vivacity of the Pentecostal experience, leading my spirit man to pronounce the glorious tongue of warfare and fire.

To Pastor Festus Adedokun, who groomed and prepared my spiritual life in the early days for greater exploits and service and whose life of service and commitment to God is impeccably emulative and of incomparable significance.

ACKNOWLEDGEMENT

In the first instance, ultimate acknowledgement and appreciation goes to God Almighty, the creator and essence of all things, the builder and the giver of knowledge, wisdom and understanding for His matchless grace, courage and confidence in actualising this dream. Without you being on my side, this endeavour would have ended in an enduring failure. Your positive placing of my life on the path of patience, the platform of persistence and the prowess of purposeful pursuit has done a lot in dousing the power and pull of perilous pessimism which pouted at the prophetic possibilities this stage of my life and career possesses. Even though my life is filled with and full of imperfections, your enduring love and the charisma of charity you have bestowed on me has always surpassed my silhouetted shallowness, and enervated my wandering ways and wills. I will always live to celebrate your glory, greatness, goodness, grandeur, graciousness, glowing beauty and the gravity of your grand gesture in giving your Son as the essence of human living and the express image of your person. Thank you Father.

My fondest appreciation, gratitude and acknowledgement goes to my humane, caring, tender, compassionate and understanding Supervisor, Dr. Moses Oke who, in every respect, is a father, brother, uncle, teacher, mentor, guide. You chose to understand me when all else proved I was incomprehensible. You encouraged and stood by me during my periods of trials, temptation, tests, tribulation, teasing, taunting. The *Osan kan*, *Oru kan* that you earmarked to read, critique and assess this work is still a marvel to me. Your capture of the tenor of thoughts and the irate and restless ideas within me have inculcated into my academic career a lot of major and significant lessons preparing a pedestal of progress and purpose for me.

Your intellectual abilities are not to be judged by whatever deficiencies may be in this work; they are strictly mine. I appreciate your sense of modesty, simplicity and the aura of guaranteed intellectual and personal humility that you profess, project, possess, virtues and qualities that have constantly abided with you and that are inherent in you. Your openness, amiability, sense of candour, sense of humour and gentleness have been very instrumental in the conception of this work and in the articulation of some of the ideas expressed in this work. Your angelic attitudes many times when I come to you for the way forward have helped to reduce and remove the many moments of tension, stress and strain on this work.

God will reward you and your family abundantly for your labour of love, unmistakable understanding, and perennial prayers. Your desired breakthroughs and the mountain of your academic and personal transfiguration shall not be negotiated and bargained in Jesus name. Oba aiku says you will not die, Alagbada ina will consume all your enemies. Where there is no way, Afinimono will make a way for you.

I am also grateful to my co-supervisor, Dr. Ademola Popoola, the Dean of the Faculty of Law, Obafemi Awolowo University, for his fatherly and brotherly role in this work. Your 'jurisprudential' posture and poise are simply marvellous, consistently contagious and naturally infectious. I have not lost the confidence you reposed in me at the beginning concerning this stage of my career. Your salubrious comments on the first proposal (A Critical Appraisal of Feminist Jurisprudence) I wrote on this journey to the acquisition of a Ph.D (Power over Hell and Death) have always been my stay and defence during my period of waiting and preparation. Your timely intervention that worked out the calibrating possibility of this topic even before the qualifying examination makes me often see and think of you as a servant of the Most High and a celebrated Gamaliel on a rescuing mission for my

academic apostolicity. Thank you so much for the corrections, the inputs and the encouragement.

I am most grateful to my Head of Department, Dr. Jare Oladosu, who led me to see the light and the beauty of the discipline called 'legal philosophy.' Where shall I start and end my appreciation of your role and contribution to my sojourn in the field of jurisprudence and philosophy of law? Is it in the access to your library, several encouragements, personal discussions on this topic or the endless and countless number of discussions that have always been an eye-opener? You did not supervise this work but I owe lots and lots of inspiration to you.

I really appreciate you for making available for my use many of your articles especially Robert Horton's "Positivism and the Internal Point of View" and James Morauta's "Three Separation Theses". Particularly interesting to me is your brotherly attention and openness whenever I come to discuss legal philosophy, legal positivism or H. L. A. Hart with you. Even though some times we end up not sharing the same jurisprudential worldview on some of our favourite topics, what has always amazed me has been the parting laughter and smiles that end such discussions. This has taught me the lesson that life is not all about the practice of theory but the theory of practice, that life is not all about the theory of arguments but the agreement of theories, that a laughter and a smile is the best therapy to make the world a happy place.

Professor Makinde is greatly appreciated for instilling in me the philosophical confidence to carry on and the many encouragements to achieve excellence. Your excellent exploits in the field of African philosophy have been very challenging in shaping the tenor of my thoughts in the area of African jurisprudence. You once told me that your favourite topic in philosophy of law is the connection between law and morality. Here then is my little contribution to

that favourite topic of yours. More interestingly, I have been encouraged to form those thoughts in an area of philosophy that is dearest to your heart which is African (jurisprudence) philosophy. Thanks a lot.

I greatly appreciate Dr. Oladipo Fashina's contribution to my professional and academic career. A songwriter once said that "we shall all be remembered by what we have done". But sometimes I am inclined to think that we shall equally be remembered by what we have not done. What Dr. Fashina has not done is to give up on me in my journey to excellence. This can be seen in his brotherly and fatherly counsels, insightful critiques and ceaseless encouragements. What he has done is to provide the leeway for the achievements of excellence. I am most grateful concerning your comments on the early drafts of the proposal of this work, particularly your insightful observations on the thesis of epiphenomenalism in relation to the connection between law and morality in African jurisprudence.

Dr. Y. K. Salami is greatly appreciated for his role in ensuring that this work becomes a reality and a possibility. I cannot count the several times you have had to climb the secretariat building, when you were the head of department, in order to discuss my progress with the then deputy vice-chancellor (Academic) Professor Akinsola, on the way forward concerning the supervision of this work. Thank you for taking so much pain to chart a path of purpose and fulfilment for your brother.

Dr. Victor Alumona is to be commended for his prophetic stance and the significance of that prophetic stance in the realisation of this project. My discussions with him, when he was the head of department, about my topic of research can be regarded as revealing. One of the numerous suggestions he gave in form of brotherly counsel has really been helpful in carving out something worthy of intellectual attention. I really appreciate you for the many side talks on the nature of progress and the role of each individual in charting that path.

Dr. Famakinwa is a friend and brother. Greatly appreciated are his intellectual acumen, philosophical sagacity, favourable disposition and academic wits. Your philosophical resilience and the temperament for learning and knowledge are worthy of emulation. We started this journey together. Thank you so much for taking the lead and for leaving a path for others after you to follow.

I must not forget my wonderful colleagues Mrs Omotosho and Messrs Fashiku and Odebunmi who have demonstrated extreme understanding of the principles of encouragement. Thank you for your care, counsels and steadfast love. Thanks for being a bundle and epitome of intellectual and moral challenge. I also want to use the channel to appreciate the role and significant contribution of the administrative staff in the department. In very specific terms, I want to appreciate Alhaji Adefisoye for his fatherly role, assistance and encouragement in the processing of the necessary forms requested by the Postgraduate College. I also want to appreciate Mrs. Mmerole, Mrs. Asiyanbola and Mrs. Isogie for their several assistances. My prayer is that God will assist you also at the very point of your needs.

I owe a debt of intense and passionate gratitude to the Dean of Arts, Professor Sola Akinrinade for his immeasurable contribution to my academic and professional life. God used you to rescue me from the lion's den and to give me a ray of hope among those that are called to be the best. Thank you for salvaging me from the cruel hand of a mortgaged career. Apart from these, I also feel the depth and weight of your prayers for me. Thank you for being a source of encouragement and inspiration in the search for excellence. Thank you also for showing the way. Your exploits have been and will always be a source of challenge to me. Your indefatigability and sense of purposeful labour, silent tap from the store of and serious toil in the throne of grace are qualities in your life that are endearing to

me. Above all, thank you so much for allowing me to make use of the Faculty Resource Room at very odd hours quite contrary, I suppose, to official schedule. Only the heavens can reward you for this satiating generosity and situated goodness. Thank you very much.

In like manner, I want to appreciate the Faculty of Arts staff - Mrs Oyenuga, Mrs. Olarenwaju, Mrs. Babalola, and Mr. Ime Nyah, the faculty driver - for their kindness and goodness to me whenever I request for the keys to the Faculty Resource Room. I acknowledge Mr. Yomi Solomon, my constant companion at the Resource Room and who formed the habit of helping to secure my interests especially in connection to the Resource Room. Thank you for the cool music.

I really want to appreciate Mr. Onaolapo for being a brother and adviser. Your innumerable counsels have been simply wonderful in helping me to carry on. You are one of the several friends and well wishers who have that firm conviction that I can contribute to the field of legal philosophers. Many times, you have been found calling me legal philosophers and I realise that the grace that flows consistently from your heart of prayers have enabled me to pen down what is contained in this work.

I will not forget to appreciate my students in the PHL 319 class of 2001-2002 session who provided enough friendliness, care and fondness, and above all, the intellectual challenges and stimulation in my understanding of philosophy of law. Included in the least are Late Margaret Adeleke, Onuma Orieji, Soji, Olumide Shokoya, Chika, Aina, Ayo Awojolu, and others who are presently in the law scholl. I wish them all success in all life's endeavours. May God smoothen your journey and crown all your efforts with abundance of success.

Bountiful appreciation is extended to Mrs Uji and her children for their support, love and encouragement. Their closeness and friendship has been sweet

and challenging. The courage through which you all have taken life is really commendable and worth emulating. In this regard, I also want to specially acknowledge Mrs. Egharevba for her simplicity and sense of care and love. Your demonstration of love is shown whenever I bump into your office. Your inestimable value lies in giving your time and attention to discuss on spiritual and sacred issues. Those discussions have ended in instilling in me a sense of challenge and seriousness. Thank you so much.

I specially want to thank all members of Deeper Life Campus Fellowship and Mountain of Fire and Miracles Ministries for their prayerful support, encouragement and kind heartedness. I really believe that my being someone today is due to the sacrifices and selfless services that you have rendered in making my life a better and an enduring one. God will never depart from you all.

I am also acknowledging my student-friend whose closeness to me have been unquantifiably profiting to me in the writing of this project. I remember Miss Tola Adewole (Sister T.) whose birthday falls on the same day with that of my Daughter Precious. Tola, you have been so wonderful a friend, sister and student. Your laughter is enriching and very encouraging. Thank you for all your prayers and counsels. Thank you also for the confidence you have in me in sharing part of life's hurdles. My prayer for you is that God will elevate you above the level of controversies. My sincere gratitude also goes to Seun Adeniran whose laughter and smiles are really full of sisterly affection. Thank you also for your kind words and encouragement every time. Thank you also for scoring an excellent grade in your project on "Justice in a Multicultural Setting". That is all I wanted. I am proud of you.

What exact statements do I conjure in expressing my appreciation to Helen Aitegbemisola Ighalo, a friend, sister and student whose level and depth of care

and understanding is cherubically concordant and consistent, whose friendship is second to none, whose awareness of excellence is comforting and reassuring, whose patience and commitment is unassuming, unpretentious and calming. You have always shown interest in what I do, in particular, my academic work. The patience and sense of enthusiasm you have always shown especially in the editing, reading and critique of certain points is worthy of mentioning.

It is my earnest desire to appreciate and acknowledge my parents Reverend L. O. Idowu and Late Mrs F. A. Idowu for their tireless and unrelenting care, love and affection towards me in providing, sponsoring and helping me in always. It is a nice and joyful thing to have you as parents. Thank you for giving me the opportunity to traverse the world of books up till this stage and thank you also for helping me to discover myself when all hopes were lost. I really appreciate you. The heavens will reward your labour of love and kindness. Those that sow in tears shall reap in mercy and joy. The joy that comes after sowing shall not elude you in the name of Jesus. What you have sown shall not be wasted.

I also appreciate my brothers and sisters whose hopes and dreams over my life is commendable. My Sisters Olaide Oshunwusi, Dayo Wright, Toyin Sanni have been very good to me. Their sense of encouragement has been of unparallel significance in mounting up higher in life. My brothers have equally been wonderful and amazing. Samuel Olayinka Idowu, David Olushola Idowu, Michael Oluwatosin Idowu have been brothers indeed. Your sense of admiration for my success has been a touching platform which has engineered the drive for more success and excellence in me. Thank you also for your areas of exploits in the world of possibilities. May God continue to bless your endeavours in Jesus name.

I really want to appreciate and express my gratitude to my modest and immediate family, my home and joy. I really appreciate my wife, Mrs. Confidence

Chiamaka Idowu-William, for her relentless love and care for me spiritually, physically and materially and, also, to the loving and fondest affection of my Daughter, Miss Precious-Deborah, Opelope Jesu, Oluwabusayo, Ify, Idowu-William for her series of questioning, interrogation, comments and overall curiosity concerning this project and why it is the case that I have to stay in the office working relentlessly to complete this project.

Lastly, I acknowledge myself.

TABLE OF CONTENTS

TITLE PAGE I

CERTIFICATION PAGE II

DEDICATION PAGE III

ACKNOWLEDGEMENTS.. IV

TABLE OF CONTENTS VIII

ABSTRACT XI

INTRODUCTION 1

CHAPTER ONE: JURISPRUDENCE AND THE RELATION BETWEEN LAW AND MORALITY .. ..

1.1 INTRODUCTION .. ..

1. 2 CONCEPTIONS OF JURISPRUDENCE .. ..

1. 3 ORIENTATIONS IN JURISPRUDENCE .. ..

1.3.1 ANALYTICAL JURISPRUDENCE .. ..

1.3.2 SOCIOLOGICAL JURISPRUDENCE OR THE SOCIOLOGY OF LAW

1.3.3 THE JURISPRUDENCE OF JURIMETRICS .. .. ..

1.3.4 POSTMODERNIST JURISPRUDENCE .. ..

1.3.5 FEMINIST JURISPRUDENCE .. ..

1.3.6 GLOBALISED JURISPRUDENCE .. ..

1.4. SOME PERSISTENT PROBLEMS AND QUESTIONS IN JURISPRUDENCE

1.5 THE RELATION BETWEEN LAW AND MORALITY: FIVE THEORETICAL PERSPECTIVES .. ..

1.5.1 THE HISTORICAL/CAUSAL PERSPECTIVE .. .. ..

1.5.2 THE VALIDITY/OBLIGATION PERSPECTIVE .. .. ..

1.5.3 THE ENFORCEABILITY/CRIMINALISATION PERSPECTIVE ..

1.5.4 THE NECESSITY/CONCEPTUAL PERSPECTIVE .. ..

1.5.5 THE CULTURAL PERPSECTIVE .. ..

1.6. CONCLUSION .. ..

CHAPTER TWO: THE SEPARABILITY THESIS .. ..

2.1 INTRODUCTION .. ..

2.2 THE NATURE OF LEGAL POSITIVISM.. .. ..

2.3 THE SEPARABILITY (OR SEPARATION) THESES .. .. ..

2.3.1 FEMINIST JURISPRUDENCE AND THE SEPARATION THESIS..

2.3.2 HISTORICAL JURISPRUDENCE AND THE SEPARATION THESIS..

2.3.3 LEGAL POSITIVISM AND THE SEPERATION THESIS .. ..

2.3.3.1 THOMAS HOBBES AND THE SEPARABILITY THESIS

2.3.3.2 DAVID HUME AND THE SEPERABILITY THESIS ..

2.3.3.3 JEREMY BENTHAM AND THE SEPERABILITY THESIS

2.3.3.4 JOHN AUSTIN AND THE SEPARABILITY THESIS

2.3.3.5 H. L. A. HART AND THE SEPARABILITY THESIS

2.3.3.6 POST-HARTIAN POSITIVISM AND THE SEPARABILITY THESIS.. .. ..

2.3.3.6.1 EXCLUSIVE (HARD) LEGAL POSITIVSM AND THE SEPARATION THESIS ..

2.3.3.6.2 INCLUSIVE (SOFT) LEGAL POSITIVISM AND THE SEPARABILITY THESIS ..

2.3.3.7 POSITIVISM TODAY AND THE ETHICAL QUESTION ..

2.3.3.7.1 ETHICAL POSITIVISM .. .. ..

2.3.3.7.2 THE FALLIBILITY THESIS .. ..

2.3.3.7.3 THE NEUTRALITY THESIS .. ..

2.3.3.8 REALIST POSITIVISM AND THE SEPARABILITY THESIS

2.4. CONCLUSION

CHAPTER THREE: ON THE QUESTION OF THE NATURE OF AFRICAN JURISPRUDENCE .. ..

3.1 INTRODUCTION .. ..

3.2 AFRICAN JURISPRUDENCE AS AFRICAN PHILOSOPHICAL INQUIRY.. ..

3.3 AFRICAN PHILOSOPHY AND THE FOUR TRENDS .. ..

3.4 AFRICAN JURISPRUDENCE AND THE FOUR PERSISTENT QUESTIONS ..

3.5 WHY IS AFRICAN JURISPRUDENCE NOT REPRESENTED IN THE BODY OF THOUGHTS ON JURISPRUDENCE? .. ..

3.5.1 THE CONCEPT OF CANON AND CANON FORMATION .. ..

3.5.2 EUROCENTRISM AND THE DILEMMA OF AFRICAN JURISPRUDENCE

3.6 THE NATURE OF AND CONCEPTS IN AFRICAN (YORUBA) JURISPRUDENCE

3.6.1 A THEORETICAL ANALYSIS OF THE NATURE OF YORUBA POLITICAL PHILOSOPHY .. ..

3.6.1.1 THE IMPERIAL THEORY .. ..

3.6.1.2 THE ROMAN - EMPIRE THEORY .. .. ..

3.6.1.3 THE ORIGINAL ANCESTOR THEORY .. .. ..

3.6.1.4 THE EBI CONCEPT OR THEORY .. .. ..

3.6.1.5 THE *IWA* THEORY .. ..

3.6.2 THE NATURE OF AFRICAN JURISPRUDENCE.. .. .. ..

3.6.2.1 THE CONTENTION THAT LAWS IS AN INSTRUMENT OF CONCILIATION, RESTORATION AND RECONCILIATION

3.6.2.2 THE NATURE OF AFRICAN JURISPRUDENCE CONSISTS IN THE CONTENTION THAT LAWS ARE CODES OF

GENERAL PRINCIPLES, NOT OF DETAILS, FOR THE GENERAL GUIDANCE OF SOCIETY.. .. .. ..

3.6.2.3 THE CONTENTION THAT LAW IS A REFLECTION OR AN EXPRESSION OF THE LIFE-FORCE COMMUNAL UNION .. ..

3.6.2.4 THE CONTENTION THAT LAWS ARE RECOGNISED CONSTITUTING AN OPERATIONAL NORMATIVE SYSTEM EMBODIED IN UNWRITTEN BUT WIDELY ACCEPTED USAGES AND PRACTICES IN FORMS OF COVENANTS AND CUSTOMS .. ..

3.7 CONCLUSION .. ..

CHAPTER FOUR: AFRICAN JURISPRUDENCE AND THE SEPARABILITY THESIS..

4.1 INTRODUCTION .. ..

4.2 LAW AND MORALITY IN AFRICAN JURISPRUDENCE: STATE OF ANALYSIS..

4.3 LAW AND MORALITY IN AFRICAN JURISPRUDENCE: SOME EXISTING POSITIONS .. ..

4.3.1 MAX GLUCKMAN, AFRICAN JURISPRUDENCE AND THE RELATION BETWEEN LAW AND MORALITY .. ..

4.3.2 FIDEL OKAFOR, AFRICAN JURISPRUDENCE AND THE RELATION BETWEEN LAW AND MORALITY .. ..

4.3.3 OMONIYI ADEWOYE, AFRICAN JURISPRUDENCE AND THE RELATION BETWEEN LAW AND MORALITY .. ..

4.3.4 SOME OTHER CONCEPTUAL POSSIBILITIES .. ..

4.3.4.1 THE THESIS OF EPIPHENOMENALISM .. ..

4.3.4.2 THE THESIS OF ACCOMODATIONISM.. .. ..

4.3.4.3 THE THESIS OF CULTURALISM .. .. ..

4.3.4.4 THE DERIVATIVE THESIS .. ..

4.3.4.5 THE THESIS OF ASSIMILATIONISM .. .. ..

4.3.4.6 THE CONCEPTUAL COMPLEMENTARISM THESIS ..

4.4 CONCLUSION

CHAPTER FIVE: SUMMARY AND CONCLUSION.. .. ..

5.1 AN OVERVIEW.. .. ..

5.2 AFRICAN JURISPRUDENCE: CHALLENGES AND POSSIBILITY OF FURTHER RESEARCH DIRECTIONS .. ..

5.2.1 AFRICAN JURISPRUDENCE: FURTHER RESEARCH DIRECTIONS.. ..

5.2.1.1 FURTHER RESEARCH POSSIBILITIES ON THE NATURE OF AFRICAN JURISPRUDENCE .. .. ..

5.2.1.2 FURTHER RESEARCH POSSIBILITIES ON THE BASIC CONCEPTS IN AFRICAN JURISPRUDENCE ..

5.2.1.3 RESEARCH METHODS IN AFRICAN JURISPRUDENCE

5.2.2 AFRICAN JURISPRUDENCE: CHALLENGES, PROSPECTS AND APPLICATION .. ..

5.2.2.1 AFRICAN JURISPRUDENCE: THE CHALLENGES AND THE CRISIS OF THE STATE IN AFRICA .. ..

5.2.2.2 AFRICAN JURISPRUDENCE AND THE CHALLENGES OF GLOBALISATION AND DEMOCRATISATION IN AFRICA..

BIBLIOGRAPHY .. ..

TITLE: **A CRITIQUE OF THE SEPARABILITY THESIS IN THE CONTEXT OF AN AFRICAN JURISPRUDENCE**

AUTHOR: **IDOWU William Oluwunmi**

DEPARTMENT: **PHILOSOPHY**

DEGREE: **Ph.D. (PHILOSOPHY)**

YEAR: **2006**

ABSTRACT

The study examined the positivists' view that law and morality were conceptually separable in the light of the nature and substance of an African jurisprudence. This was with a view to understanding the controversy in jurisprudence over the relation between law and morality.

The methodology involved a critical analysis of such concepts on the nature of the relation between law and morality in African jurisprudence as complementarism, epiphenomenalism, assimilationism and accommodationism. Theories in Yoruba social and political thoughts such as the *ebi* theory, *iwa* theory, *imperial* theory, *Roman-Empire* theory and the *original ancestor* theory were reviewed.

The results showed that legal positivist's separability thesis was open to some semantic confusion, such as the confusion over conceptual dissimilarity and conceptual separability, and endless emendations which rendered the thesis difficult to understand. The study also observed that many positivists did not even agree on the exact meaning of the thesis, which explained the division between inclusive and exclusive positivism. Exclusive positivism contended that laws did not necessarily satisfy the demands of morality, while inclusive positivism asserted that laws reproduced certain demands of morality. While inclusive positivists were divided over whether morality was a necessary or sufficient ground for legal validity, exclusive positivists were antagonists of inclusive positivists. It was also discovered

that the separability thesis was not generally entertained in the canons of African jurisprudence, which posited the complementariness rather than separation between law and morality. Finally, the study ascertained that dissimilarity between two or more concepts did not entail separation especially if the concepts in question were complementary.

The study concluded that law and morality, in the light of African jurisprudence, were held to be complementary concepts in any legal system and to that extent inseparable.

SUPERVISOR: **DR. MOSES OKE**

CO-SUPERVISOR: **DR. ADEMOLA POPOOLA**

NUMBER OF PAGES: **461**

INTRODUCTION

Philosophical controversies are rarely resolved, but some do fade away. There are few, however, which have the extraordinary capacity for survival[1]. There are clusters of questions which might be referred to as the core issues of legal, political and philosophical theory in that they recur again and again as the concern of political philosophers.

The ever-recurring problem is how all of human experience may be made fruitful for the progressive understanding of a particular object of knowledge. Law is such an object. Law is one of the greatest institutions and social practices ever developed by man. It represents a major step in cultural evolution. It also presents, in its totality, humankind's experience in the light of its contact with the world within and without. In the light of the experiences of man, it is a basic hypothesis that without a comprehensive grasp of all experience, law can be presented only in an artificial and contradictory way.

In philosophy of law or jurisprudence, a central concern and subject matter that divides one set of writers from others has been the very nature of law. Being a special branch or sub-branch of general philosophy, philosophy of law, or jurisprudence, is occupied with the academic and intellectual attempts to offer general and specialised philosophical reflections upon the general foundations of the principles of law. In other words, it studies philosophical problems raised by the existence and practice of law. Furthermore, from this general approach, it also seeks to consider other issues that revolve or that are clustered around the notion of law. Such overlapping issues include the notion of equality, justice, rights, authority,

[1]Sklar, J. 1964 *Legalism* Cambridge: Harvard University Press, p. 29.

legitimacy, order, peace, political behaviour, culture etc. The overlapping nature of these issues with the concept of law makes the boundary of jurisprudence overwhelmingly interesting on one hand and also parasitic on the other. According to Ronald Dworkin,

> *The philosophy of law studies philosophical problems raised by the existence and practice of law. It therefore has no central core of philosophical problems distinct to itself, as other branches of philosophy do, but overlaps most of these other branches. Since the ideas of guilt, fault, intention, and responsibility are central to law, legal philosophy is parasitic upon the philosophy of ethics, mind, and action. Since lawyers worry about what law should be, and how it should be made and administered, legal philosophy is also parasitic on political philosophy. Even the debate about the nature of law, which has dominated legal philosophy for some decades, is, at bottom, a debate within the philosophy of language and metaphysics*[2]

Since jurisprudence has to do with philosophical studies on the problems raised by the existence and practice of law, concerted intellectual discussions on the nature of law reveals three dimensions on which the concept of law can be fruitfully discussed. In the first sense, law can be seen *as a distinct and complex type of social institution*, premised on the essence of social relations. As a social institution, it therefore attracts an instrumental function in the regulation and direction of social and inter-group relations.

In the second sense, law may be conceived as *rules of law*, as distinct types of rules or other standards having a particular pedigree or origin. Law performs in this sense an idealistic function. In the third sense, law can be seen as a particular source of certain rights, duties, powers, and other relations among people. In this sense, law performs a derivative function from which privileges in society are derived or obtained.

[2] Dworkin, R.M. (ed.) *Oxford Readings in Philosophy. Philosophy of Law*, Oxford: Oxford University Press, 1977, p. 1.

Justice Oliver Wendell Holmes Jnr. once retorted that "the life of the law has not been logic, but experience".[3] In the same vein, Karl Friedrich once asserted that:

> *Only by taking account of all the different kinds of experience can we give an image of the law adequate to reality and at the same time general. Only then can a comprehensive jurisprudence be developed*[4]

In the light of this philosophy of experience, one cardinal, perennial and important debate and controversy in the history of jurisprudence centres on the relation between law and morality. The relation between law and morality is a commodious jurisprudential topic. In ancient times, as well as in contemporary times, the issues involved in the debate and controversy have assumed quite an interesting and dramatic form to the extent that its whole essence in legal philosophy seems not only pervasive but, paradoxically, also evasive. Indeed, the core of the matter has been, not whether there is indeed a relation between law and morality, nor has it been what the essence of such a relation is. Rather, it has been whether such a relation is a necessary or logical one, or a merely contingent or accidental one.

It is empirically true that, in most societies, there is an observed overlap between legal questions and those of morality. The teachings and injunctions of morality are also detested by the restrictions of law. This observation is grounded in the fact that both law and morality have been found to work with the same item of human behaviour. The history of jurisprudence and legal philosophy is littered and replete with varying attitudes and intellectual positions on the nature of the relation between law and morality.

The long-standing controversy on the nature of the relation between law and morality has been identified, in legal philosophy, mainly with the natural law theorists and legal positivists. Precisely, both legal positivists' and natural law thinkers'

---

[3] Holmes, Jnr. 1920 *The Common Law*, p. 1.

positions on the issue have concentrated on whether the relation is contingent or necessary, accidental or logical, empirical or conceptual. Sometimes, the standard statement of legal positivism is called the 'separability thesis' or 'the separation of law and morals. As aptly put and captured by Neil MacCormick, this is the view that "law can be explained, analysed, and accounted for in terms independent of any thesis about moral principles or values." The ground for this position, according to MacCormick, is that "in some way or another the validity and the content of law depend upon social practices or usages."

Law, founded on social practices and usages, acquires its normative character through the intervention of some methodological and epistemological principles which, according to MacCormick, are clearly independent of moral judgment.[5] As Hart unequivocally puts the separability thesis, the validity of a legal norm "does not depend in any way on its equity or iniquity"[6] The meaning and implication of this position has enjoyed both classical and contemporary attention such that, without due considerations given to its expressions, the history of legal philosophy is grossly incomplete.

The substance and implication of legal positivists' separability thesis is far reaching. It often accounts, in part, for the history, nature, substance and, more importantly, the limitations and weakness of natural law theory. Although natural law theorists have not been unanimous in their responses to the positivists' separability thesis, their essential position can be seen as the view that to accept the full

[4] Friedrich, C. J. 1963 *The Philosophy of Law in Historical Perspective*, (Chicago: University of Chicago Press, p. 7.
[5] Neil MacCormick, "Natural Law and the Separation of Law and Morals" in *Natural Law Theory Contemporary Essays*, edited by Robert P. George, Oxford: Clarendon Press, 1992, pp. 105-133, at p. 107.
[6] Hart, H. L. A. *The Concept of Law*, Oxford: Clarendon Press, 1961, p. 199.

implication of positivists' separability thesis is to reduce a legal system to a suicide club, failing, by that insistence, to distinguish between both.[7]

The dilemma inherent in the acceptance of the thesis of separation, it is believed, sometimes involves an endorsement of what Mario Jori calls 'the doctrine of conformism' which is itself an aspect of the *reductio ad Hitlerum*.[8]It is believed that whatever position is taken on this crucial perspective is bound to influence the position one takes with respect to other manifestations of the relation between law and morality.

For instance, if one argues in favour of the view that law and morality express a conceptual relation, it follows that one is inclined to hold to the view that the understanding and salience of moral principles are fundamental to the idea of legal validity. In like manner, it follows that one is inclined to hold on to the view that legal means be employed to enforce morality. On the other hand, if it is the case that one subscribes to the view that law and morality only bear a contingent relation, then it follows for that person that legal validity has nothing to do with the moral nature of legal rules. And, indeed, that law cannot be used in enforcing morality.

This research work is primarily concerned with a critical examination of the legal positivist position on the relation between law and morality in the light of the corpus of thoughts and emerging trends on African jurisprudence. The legal positivist view on the relation between law and morality often and popularly termed the 'separability thesis' sponsors the view that law and morality bear only a contingent relation. This work is concerned with a critical and philosophical interrogation of the legal positivist thesis from the perspective of an African jurisprudence.

---

[7] D'Entreves, Alessandro Passerin *Natural Law*, London: Hutchinson, 1970, pp. 198-203.
[8] See Jori, M. "Legal Positivism" in *Routledge Encyclopedia of Philosophy*, Edward Craig (ed.), New York: Rourledge, 1998, p. 515.

By adopting a critical examination of legal positivism and the separability thesis, concentration shall, in the first place, be on classical positivism as pioneered by Hobbes, Hume, Bentham, Austin and as defended in modern times by H. L. A. Hart. Moreover, critical attention shall also be paid to contemporary trends in positivists' analyses, discussions and debates on the separability thesis, especially as sourced in Hart's revised edition of his *The Concept of* Law. This relates to the distinction between exclusive or hard positivism and inclusive or soft positivism.

The significance of the distinction between these two versions of positivism in relation to the separability thesis, or what some call, the 'value thesis', shall also be carefully stated. One major significance of the debate over the distinction between exclusivism and inclusivism is that it created an opening for the discussion of some other theses in relation to the value thesis. Some of these theses include ethical positivism, fallibility thesis, and neutrality thesis. This work shall also attempt to construct and establish, in very detailed terms, the import of such theses and their overall importance in the understanding of the separability thesis as advocated by legal positivists.

Significantly, also, the bulk of work on African jurisprudence shall be drawn mainly from the Yoruba tradition. Other traditions in diverse African cultural settings, bearing in mind the similarity in experiences shall also be perused. Some of the legal traditions in African societal settings to be consulted in establishing a critical appraisal of positivists' separability thesis include the Yoruba cultural philosophy of law, Igbo philosophy of law and the ideas in Barotse jurisprudence. The critical construction that is attempted in the light of the legal traditions in these African societies concerns the nature of the connection between law and morality.

To aid the proper execution of the research and to present the contentions in legal philosophy over the relation between law and morality in proper terms, this research work will be raising the following questions in a bid to furnish the research with a sense of direction. The questions are not ends in themselves; their importance lies in the fact that they help to bring out the aims or intentions of the research in the light of its general and specific objectives. Precisely, they tend to open up the vast world of philosophical possibilities available to the research in the light of the various ways, both practical and hypothetical, in which different scholars may understand the problematic of the research. The questions are the following:

1. What is law? What is morality? What is the precise relation or connection between law and morality?
2. What are the dynamics and the basis of the controversy in legal philosophy concerning the relation between law and morality?
3. What is legal positivism? What are the main theses, content and position of the school of legal positivism?
4. What is the meaning of the separability thesis?
5. What are the arguments of the school of legal positivism on the separability thesis?
6. How convincing and adequate, philosophically, are the arguments of the school of legal positivism on the view and the position that law and morality are conceptually separable?
7. What are the arguments and views of the critics of the school of legal positivism on the position that law and morality are conceptually separable? How convincing and adequate, philosophically, are the arguments of the critics of legal positivism on the separability thesis?

8. Is there an African jurisprudence? What are the nature, thesis and proposition(s) of African jurisprudence?
9. What is the nature and arguments of African Jurisprudence on the relation between law and morality?
10. How convincing and adequate, philosophically, are the challenges of African jurisprudence to legal positivism and the separability thesis?
11. What are the (theoretical and practical) shortcomings and limitations of African jurisprudence's conception of the relation between law and morality?
12. What further research directions and possibilities, philosophically, does African jurisprudence provide for African philosophy in particular and legal philosophy in general?

With these questions at the back of our minds, the work is divided into five chapters. The first chapter, titled "Jurisprudence and the Relation Between Law and Morality", is devoted to a painstaking conceptual analyses and critical survey of the nature of jurisprudence. This is done to set the context and tenor of the continuing controversy over the relation between law and morality. Part of what the chapter is devoted to understanding is the divergent orientation that exists in jurisprudence. In this chapter, five conceptual frameworks and perspectives were analysed in the bid to understand the nature of the problem concerning the relation between law and morality in jurisprudence and legal philosophy.

The second chapter of this work is titled "The Separability Thesis." This chapter is a detailed, critical and rigorous examination of the contents, assumptions, basis and justification of legal positivists' separability thesis. In this chapter, the various definitions and assertions concerning what the nature and meaning of the separability thesis as defined and held by past and present, classical and modern

positivists were carefully highlighted. Basically, this chapter examines the antagonism between the positivists and naturalists over the exact implication of what is meant by the separability thesis and its opposite, the inseparability thesis, as held and emphasised by legal naturalists. This chapter also attempted a distinction between what is called, in modern positivist circle, exclusive or hard positivism and inclusive or soft positivism. The debates and discussion further generated by the unresolved nature of the distinction and disagreements between the exclusive positivists and inclusive positivists over the separability thesis, such as Tom Campbell's ethical positivism, Klaus Füßer's fallibility and neutrality theses, were also freely discussed. Furthermore, the realist dimension to the separability thesis was also carefully discussed.

The third chapter is devoted to a critical analysis of the nature of African jurisprudence. The chapter is titled "On the Question of the Nature of African Jurisprudence." This chapter considers discussions on the nature of African jurisprudence. Basically, the chapter addresses itself to four persistent questions concerning the nature of African jurisprudence. A critical attempt to grapple with each of these questions formed the core of this chapter. In furtherance of this, this chapter proceeded in establishing the features of what an African jurisprudence, Yoruba jurisprudence, or Igbo or Barotse jurisprudence, for examples, would look like.

The fourth chapter is an attempt to understand the separability thesis in the context of an African jurisprudence. The chapter is titled "African Jurisprudence and the Separability Thesis." The chapter consists of detailed analysis and critical evaluation of the separability thesis in the light of the nature of an African jurisprudence established in chapter three. The chapter examined the various dimensions of the separability thesis as discussed and defended by legal positivists vis-à-vis the canons of African jurisprudence.

What the chapter attempted was a critical appraisal of the relation between law and morality as it obtains in Yoruba jurisprudence and other similar jurisprudential structures such as Barotse and Igbo jurisprudence. In doing this, the chapter examines some conceptual possibilities for the interpretation of the separability thesis in African jurisprudence, apart from the existing positions already set forth by scholars such as Max Gluckman, Omoniyi Adewoye and Fidel Okafor.

Some of the conceptual possibilities on the relation between law and morality in relation to African jurisprudence discussed include the thesis of epiphenomenalism, assimilationism, accommodationism, culturalist thesis, the derivation thesis and the thesis of conceptual complementarism. The chapter also considers some objections to the nature of relation between law and morality as it exists in the jurisprudences considered.

The fifth chapter is the summary and conclusion of the work. This consists of an appraisal of the basic themes and thesis of the research work. As part of the summary and conclusion of the work, possible research directions on the nature of African jurisprudence in relation to the wider field of jurisprudence in general were established.

CHAPTER ONE: JURISPRUDENCE AND THE RELATION BETWEEN LAW AND MORALITY

1.1 INTRODUCTION

This chapter provides a conceptual analysis and critical survey of the nature of jurisprudence, and sets the context and tenor of the continuing controversy over the relation between law and morality. The questions it raises are: What is jurisprudence? What is the nature of the problems of jurisprudence? What is the nature of the relation between law and morality? How does the fact of differences in jurisprudential orientations affect the controversy over the relation between law and morality? Why is law held to be separable/inseparable from morality?

The contention of this chapter is that the problem of the relation between law and morality is basically conceptual, as it arises from the controversies over what jurisprudence is and what the law is. In other words, since jurisprudential discourses present diverse opinions on what jurisprudence is, with the traditions that have grown out of them, we cannot but have abiding and unsettled controversies on the nature of the relation between law and morality.

The ground for this contention is in the history of jurisprudence, as well as in the history of debates on the jurisprudential problem of the nature of law. It is also to be noted that what accounts for the perennial and persistent controversies surrounding the problem of the relation between law and morality revolves around the unsettled nature of the meaning of law itself. The fact that there are no agreed definitions on the nature, content and constituents of law also relevantly bears on the problematic of the relation between law and morality.

It is equally contended that the lingering controversies in jurisprudential debates and discourses afford an opening for the idea of cultural jurisprudence, and hence, the possibility and desirability of multicultural contributions to the issue of the relation between law and morality.

1. 2 CONCEPTIONS OF JURISPRUDENCE

The term **"jurisprudence"** is a vague and difficult term to define with certainty and accuracy. This stems from the fact that various legal traditions and philosophical orientations have had enormous influence on the nature, scope and limit of the subject matter. This conceptual problem is not quite unexpected in view of the historical development of the word and the ideas that revolve and cluster around it. An empirical manifestation of the fluidity of the concept of jurisprudence is the diversity of opinions in the legal systems of countries that were immediately influenced by its progenitors.

In other words, the concept of jurisprudence, even in its original western domain, has grown and become widely diffused in its contents, application, practical utility and verifiability. In the light of the several conflicting meanings which the term has thus attracted over time, its universal essence and form have become very opaque and, so, difficult to discern.

In Germany, for instance, jurisprudence is more or less synonymous with law taken as an object of scientific study. What this scientific study of law consists in, however, remains unsettled even in the present century. For example, a very well known aspect of German history in general and in relation to the jurisprudential history of that country is the popularity of Nazi jurisprudence. Nazi jurisprudence as representing the true colour of German jurisprudence remains a controversial subject. For some scholars, true German jurisprudence stands distinct from the core elements

of Nazism. Nazi jurisprudence, it is claimed, only made use of traits that were already intestinal to existing German legal culture.[1] For some others, there is nothing unsurprising about the rise of Nazi jurisprudence as truly representing the nature of German jurisprudence. This is because in actual fact, German legal ideology manifests an extreme form of patriotism which needed a figure or frame of mind such as Hitler to entrench or establish.[2]

As an Anglo-American term, jurisprudence is understood to represent the various aspects of the theoretical study of law. In French legal history, jurisprudence stands for the jurisdiction of the courts, both as the interpreter and the developer of its several codes.[3] A major exponent of this sociological idealism in French jurisprudence was the French jurist, Francois Geny. According to Geny, it is impossible to interpret the French code according to strict logic. Rather, such codes are to be interpreted in the light of the realities of social life. In one word, the dominating principle in guiding the court must be the balance of interests concerned. These are instances of dissenting tendencies in the modern conception of jurisprudence.

These dissenting tendencies in what was thought to be hypothetically theoretical and a philosophical abstraction have given rise to what has come to be termed 'comparative jurisprudence'. The constituents of comparative jurisprudence lend credence to the difficulty, problematic and the controversy concerning the nature,

[1] See Shane Taylor, "Nazi jurisprudence is an unsurprising outcome of German legal Tradition - A Proposition" http://www.warwick.ac.uk/~sysdt/stl2003-m4.htm. These traits included ideas of nation-building, the desire to be a large and powerful nation, the *Stiltlichkeit* i.e. the monopoly of the force of the state, the rejection of individualism and celebration of group ethic, etc.

[2] Kam Bhamera, Nazi Jurisprudence is not a surprising outcome of German Legal Tradition - A proposition" http://www.warwick.ac.uk/~sysdt/stl2003-m4.htm. According to this viewpoint, inherent and visible in German legal ideology was an existent disdain for fundamental human rights. What existed as part of the provision of the German legal culture was an acceptance of citizenship rights. Being German was of absolute necessity and importance than being human. It is part and element of German legal ideology that paved the way for the triumph of Nazism.

[3] W.G. Friedmann, *Chambers's Encyclopaedia* New Revised Edition, Vol. 8, London: International Learning Systems Corporation Limited, 1969, p. 157.

definition and scope of jurisprudence in particular and the philosophical enterprise in general.

Ultimately then, the question still is 'what is jurisprudence?' The answers proffered to this question over the ages have been the starting point for separating one set of legal philosophers from another. For one thing, the answers themselves, though sometimes inadequate, have helped to show the philosophical tendencies and leanings inherent in jurisprudential discourses. In some other respects, the continuing debates that such answers have occasioned among one camp of philosophers and another shows, again, the uncertain and vague nature and issues that philosophy has preoccupied itself with.[4]

More importantly, however, is the view that the responses to the questions show the distinction between philosophy and other core disciplines in the arts or sciences. Philosophy places greater emphasis on methods rather than subject matter. The value of philosophy is, in fact, to be sought largely in its very open-endedness. It is rooted in controversy over prejudices derived from common sense, from the habitual beliefs of one's age or nation, and from convictions which have grown up in his mind without the co-operation or consent of his deliberate reason.[5]

The birth and development of philosophical concepts are and have always been tainted with controversies. Philosophical ideas are borne out of deep moments of cogitative productiveness, intellectual itinerary and perceptual controversies. An idea conceived in controversy seems to attract controversy as its sustaining factor. This is the nature of philosophical ideas and subject matter. It is no wonder that Judith Sklar

[4] Bertrand Russell, "The Problems of Philosophy", in *Classic Philosophical Questions*, James A. Gould, (ed.) 4th Edition, Oxford: Clarendon Press, 1982, p. 27.
[5] Bertrand Russell, ibid., p. 29.

contended that philosophical controversies are rarely resolved, but some do fade away. There are a few, however, which have an extra ordinary capacity for survival.[6]

Etymologically, the word jurisprudence derives from the Latin term **'juris prudentia'**, which means "the study, knowledge, or science of law." In line with this derived meaning, Richard Hirshberg contended that Jurisprudence is a term ordinarily defined as the science of law. Furthermore, in his words:

> *Jurisprudence is a functional study of the concepts that legal systems develop and the social interests that law protects. The functional aspects is also stressed in the description of Jurisprudence as the practical science of giving a wise interpretation to the laws and of making a just application of them to all cases...It includes both the legal ordering of human relations and the body of legal institutions and materials by which the legal process is carried out.*[7]

From this conception, three central ideas can be gleaned about the nature of jurisprudence. Jurisprudence is a functional science about law, a practical science about law, and lastly a science of relations with respect to law. As a functional science about law, jurisprudence represents a study of the social interests and policies that are either enshrined in the law or that have been found to develop with the law. An aspect of the functionality of jurisprudence as a science of law consists in the fact that law exists to protect and perpetuate certain interests in every given society.

These interests may be ideological, religious, moral or ethnic. The fact that they constitute the basis of societies reveals their functional significance since they exist in almost all cultures. To this end, they serve as basis for the development of legal concepts which are rooted in the historical development of each nation, culture and civilisation. A functional science that studies legal concepts beggars the belief that the nature of jurisprudence, though a functional science, varies from one culture to another. In other words, what is functional to each epoch and nation is relative,

[6]Judith Sklar, *Legalism* (Massachusetts, 1964) p.29.

and that is why the terrain of jurisprudence is necessarily encoded in some form of relativism. This leads to the view that the meaning of jurisprudence is essentially multidimensional and thus a source of obscurity in the analysis of the nature and meaning of law and legal concepts.

From Hirshberg's analysis, jurisprudence could also be seen as a practical science of law. As a practical science, jurisprudence is concerned with the art of interpretation of laws. This aspect of jurisprudence is an offshoot of the functional nature of jurisprudence. As a functional science, jurisprudence entails the development of legal concepts. However, this aspect of jurisprudence is incomplete without a consideration of the practical aspect - the interpretation of the concepts evolved or developed. Thus, jurisprudence deals with both the development and the interpretation of legal concepts. In a nutshell, then, jurisprudence is conceived both as an originative and an interpretive science.

A proper science of law thus consists of the functional and practical elements. As a matter of distinction, the study of law consists of both the practical and the theoretical aspects. On the one hand, the practical aspect of law consists in the development of cases, the emergence of disputes and the decisions of courts, the shaping of citizens conduct through the offer of professional advises. On the other hand, the theoretical aspect consists basically in the working out of what the presumably right decision on a particular point would be, on the basis of the authoritative materials as they stand (such materials include statutes, legislative enactments, constitutions etc); and in putting the results of such work into coherent, orderly form such that general conclusions can be drawn.[8]

---

[7] Richard L. Hirshberg, *The Encyclopaedia Americana* vol. 16, New York; Grolier Incorporated, 1993, p. 238.

[8] Elvin Abeles, (ed.) *National Encyclopaedia*, Washington, D.C.: Education Enterprises, Incorporation, 1963, p. 52.

Moreover, from Hirshberg's analysis, jurisprudence is not only a functional and practical science, but also a science of relations with respect to law. The evolution of legal concepts and their interpretation are both directed towards regulating and controlling the relations between humans in every given society. Thus, no jurisprudence as a science of law is complete if it does not have a place in the regulation of human conducts and behaviours. Thus, jurisprudence as a human enterprise is involved in the ordering of relations between and amongst persons.

This makes jurisprudence a complete science of man since concepts evolved are meant to apply to the life of man and the interpretations are meant to secure his place within the society and amongst fellow humans. The entire legal processes and the institutions which perpetuate them are thus for man and are concerned about man. This makes jurisprudence, in the ultimate sense, a science of the nature of man in relation to law. Thus, jurisprudence is a human-centred science.

The foregoing conception of jurisprudence as the science of law, however, could be said to be a narrow conception of jurisprudence. If we treat and hold jurisprudence to be the science of law in terms of the function, practice and the relation of law, the normative dimension of jurisprudence appears to have been excluded. As a science, it means that meaningful jurisprudence consists only of the technical approach to law. In this sense, this conception fails to account for the normative dimension of jurisprudence, whereas law is both a normative and a descriptive enterprise.

In the same vein, jurisprudence has a prescriptive dimension as well over and above the descriptive dimension in Hirshberg's analysis of it. In fact, jurisprudence cannot but be a normative enterprise since human actions and conducts are the basic constituents of what it studies.

A part of the normative component missing in Hirshberg's analysis is the philosophical component of jurisprudence. In the view of Wolfgang Friedmann "all legal theory must contain elements of philosophy, which is an attempt to systematize man's reflections on his relation to the universe."[9] In another light, Friedmann contended that the task of legal theory is the "clarification of legal values and postulates up to their ultimate philosophical foundations."[10] Although Hirshberg posits that the nature of jurisprudence is such that it involves the task of interpretation of concepts, his analysis is still incomplete. This is because the philosophical component of any discipline is more than the mere interpretation of concepts. It involves a critical evaluation of terms, concepts and ideas in the light of certain ideals or normative principles.

Other analyses, apart from those of Hirshberg and Wolfgang have been undertaken in the bid to understand the nature of jurisprudence. Fred F. Herzog, for instance, defines jurisprudence in relation to its theoreticity. For him, jurisprudence is the "philosophy or science of law that is concerned with legal concepts and relationships. It does not pertain to actual systems of law...jurisprudence attempts to ascertain the nature and functions of law".[11]

Herzog's conception thereby makes a distinction between the theoretical aspect of jurisprudence and the practical aspect of jurisprudence. The practical aspects consists of a system of analysis that borders on actual systems of law i.e. legal systems and the way they function and operate, the theoretical aspect, on the other hand, is that which studies, creates and analyse legal concepts and the sort of relationships that they give birth to, without specificity as to legal systems.

[9] W.G. Friedmann, *Chambers's Encyclopaedia* New Revised Edition, Vol. 8, London: International Learning Systems Corporation Limited, 1969, p. 448-9.
[10] Ibid., p. 449.

This conception, however, is also inadequate. It fails to account for the important connection between practice and theory as a veritable aspect of jurisprudence. Moreover, it fails to picture the interconnectedness or interdependence between theoretical aspects of law and the practical or actual systems of laws. This is because every actual system of law is founded on certain fundamental theoretical postulations which make the actual process of law intelligible and fulfilling. Thus, a complete notion of jurisprudence is one which makes room for both the theoretical and practical aspects of law. This takes into consideration both the etymology and progress of jurisprudence. As a science of law, both etymologically and in the course of its development, jurisprudence includes both the practice and the theory of law.

Arising from the etymology of the word, the word **juris prudentia** has come to stand for the description of law or the discussion of law as it affects a particular body or branch of human endeavour. It is in this regard that we hear of medical jurisprudence, architectural jurisprudence, equity jurisprudence or engineering jurisprudence etc. What obtains is the exposition of the legal aspects of these disciplines. According to this understanding, the exposition in question in these disciplines could be that of conceptual clarification, detailed analysis or explanation of the legal import, implications or consequences of the disciplines concerned. That is why any serious jurisprudential study must incorporate familiar philosophic elements. Jurisprudence is thus the world of legal ideas. As ideas, jurisprudence is the body of legal knowledge and theory which provides the basic fundaments for the practice and hypothetical premise of law.

It is in this sense that J.G. Riddall constates that "jurisprudence is about ideas...It is a mêlée of intermingling ideas, any of which may be as relevant as any

---

[11] F.F. Herzog, *The American Peoples Encyclopaedia*, vol. 11, New York: Grolier Incorporated, 1962, p. 703.

others in considering any particular question"[12] Furthermore, Riddall contends that "jurisprudence is the study of the nature of law...The answer to the question 'what is law?' and certain other questions, forms the central theme of jurisprudence."[13] Evidently, the boundary of jurisprudence and the questions entertained within that boundary are so adaptable and expandable that they contain questions of normative, critical, analytical and theoretical interests. This is because legal questions, when they are raised, often end up sharing boundary with morals, religion and social philosophy. In other words, the boundary of jurisprudence is interpenetrative with other fields of human endeavours other than law. As Elegido has rightly observed:

> *When a jurisprudential question is raised and answered it will commonly happen that the ideas used in the answer will be themselves in need of explanation. If one keeps raising questions in this way and pushing the jurisprudential analysis to its limits, it will be found that the ultimate ideas to which reference has to be made do not belong any more to the domain of "law" but rather to those of ethics or political philosophy. This happens in the analysis of rights, duties, the authority of the law, the identity of a legal system, the duty of a judge in reference to the application of unjust laws, the principles of criminal punishment and in many other similar questions.*[14]

From the nature of jurisprudence outlined above, it could be argued that though Cotterell Roger postulated that the central concern of jurisprudence is the nature of law,[15] it appears the boundary is not limited by questions that pertain just to the nature of law alone. This is because, if it is true that the boundary of jurisprudence is expandable and adaptable, then it follows that a rational and reasonable consideration of what constitute the nature of law is open-ended and, more importantly, parasitic. The parasitic nature of jurisprudence is defined and determined in the light of the fact that its consideration of the nature of law is done

---

[12] J.G. Riddall, *Jurisprudence*, London: Butterworths, 1991, p.5
[13] J.G. Riddall, p. 15.
[14] *J.M. Elegido, Jurisprudence (Ibadan: Spectrum Books Limited, 1994) p. 67.*

[15] Roger Cotterell, *The Politics of Jurisprudence - A Critical Introduction to Legal Philosophy*, London: Butterworths, 1989, p. 1.

and executed in alliance with and the aid of other ideas in other disciplines such as politics, philosophy of language, metaphysics and even, in recent times, epistemology.[16] It is this possibility that makes the nature of law an open-ended affair. This is without distracting from the point of Cotterell's assertion, which is that the starting point, which is also the central focus, of jurisprudence, is the idea or nature of law. This, for him, is far more important than any other feature of jurisprudence.

More importantly also is the view that Cotterell's analysis introduces a cultural dimension into the concept of "jurisprudence." For him, when Anglo-American studies on the nature of the law form the object of discussion, then the object of discussion is jurisprudence. There is something questionable, however, concerning the utility and verity of this conception. The question is 'what do we call Chinese or African reflections on the nature or idea of law? Afroprudence? Chinoprudence? or what? There may be nothing wrong with this linguistic innovation, but, in obvious terms, it creates problem for our understanding of the objective meaning of the word "jurisprudence".

As it was pointed out earlier, the words ***juris*** and ***prudentia*** combine to form the single word jurisprudence. ***Juris*** means law or that which is related to law while ***prudentia*** means science or skill. The original meaning of this word does not suggest any association or connection of the word with any culture. That the word has a western root does not presuppose that the meaning is restricted to the west. So, when Cotterell claimed that jurisprudence denotes a purely Anglo-American reflection on the nature of law, he was perhaps unintentionally reconceptualising it in terms which are entirely removed from the original idea of the word 'jurisprudence' and arguably unnecessary for the progress of legal philosophy. This is not to deny the existence and

[16] For epistemological studies on the nature of law see Idowu William, 2004, "Feminist Epistemology of Law: A Cultural Critique of a Developing Jurisprudence," in *Ife Juris Review*, Vol. 1, No. 1, 4-29; G. Teubner, "How the Law Thinks. Towards a Constructivist Epistemology of Law" (1989) 23 Law and Society Review 727-57.

possibility of a cultural dimension to the study of law. Except, perhaps Cotterell can show that non-western societies lack either an idea of law or the skill to reflect on law, given that the concept arose in their culture and language.

For example, we can talk of 'African jurisprudence' as a legitimate area of intellectual inquiry into the nature of law as Africans perceive it or understand it. In this regard, it is important to note that law, first and foremost, is a cultural phenomenon and as such each and every culture may isolate some distinct elements of law as peculiar to their experience and thus a distinct aspect of their history and development. This is not what Cotterell means in his conception of jurisprudence. What he means is that only Anglo-American studies on law should and can be called "jurisprudence." The questionable status of his statement is confirmed both by language and experience. It is akin to the now abandoned attempt to deny the existence of non-western philosophies, especially African philosophy, in the last century.[17] This is also noticeable in history, music and art in which western scholars have sought to deny African involvement and capability.[18]

The import of this point consists in the fact that jurisprudence, as an intellectual inquiry into the nature of law, is not the prerogative or the privilege of Anglo-American studies alone. The boundary of jurisprudence, as an intellectual inquiry into the nature of law, is cross-cultural. This is because, regardless of how primitive or primordial a society is, it is within reason to believe that no society ever achieves the feat of survival and continued existence without an understanding and

---

[17] See, for examples, Hountoundji, P. *African Philosophy: Myth or Reality?*, Bloomington: Indiana University Press, 1996; Masolo, D. A. *African Philosophy in Search of Identity*, Bloomington: Indiana University Press, 1994; Mudimbe, V. Y. *The Invention of Africa: Gnosis, Philosophy, and the Order of Knowledge*, Bloomington: Indiana University Press, 1988; Okere, Theophilus *African Philosophy: A Historico-Hermeneutical Investigation of the Condition of its Possibility*, New York: University Press of America, 1983.

[18] See, for example, Vansina, Jan *Art History in Africa, An Introduction to Method*, London: Macmillan Press, 1984.

articulation of a set of norms or rules with which they organise themselves and preserve their society.

In spite of the attempted cultural limitation challenged above, Cotterell rightly identifies that jurisprudential studies centre on the anthropological[19], philosophical and social value of law. In his words, "law has long been thought worth studying for its intrinsic philosophical or social interest and importance, which relates to but extends beyond its immediate instrumental value or professional relevance"[20] Jurisprudence is, for him, therefore, probably best defined as encompassing all kinds of general intellectual inquiries about law without excluding the more restricted activities of doctrinal exegesis or technical prescription[21] In his conception, therefore, "jurisprudence is not a unified discipline." Rather, it is a multi-dimensional discipline, which does not discriminate against or exclude any race or culture. This is borne out in the history of jurisprudence.

One general characteristic of jurisprudence given its historical background and development is its concern with theoretical generalisation. This is to be contrasted with the emphasis on the particular and the immediate which characterise most professional legal practice.[22] It is to this end that W. Twining described jurisprudence as "the theoretical part of law as a discipline".[23] In the same vein, Richard Posner described jurisprudence as the theoretical part of the analysis of law. In his words,

---

[19] Before the turn of the 20th century, Justice Oliver Wendell Holmes (Junior) opined that "Law is a great anthropological document". See Holmes, 1899, "Law in Science and Science in Law" 12, *Harvard Law Review*, p. 444.

[20] Roger Cotterell, *The Politics of Jurisprudence - A Critical Introduction to Legal Philosophy*, London: Butterworths, 1989, p. 1.

[21] Ibid., p. 2. According to Roger Cotterell, jurisprudence is the Anglo-American term used most often to describe or refer to the whole range of actual and possible inquiries concerned with this (social and intrinsic philosophical) significance of law. P. 1-2

[22] ibid., p. 2.

[23] W. Twining, "Evidence and Legal theory" in *Legal Theory and Common Law* W. Twining (ed), 62-80, Oxford: Basil Blackwell, 1986.

"by jurisprudence I mean the most fundamental, general and theoretical plane of analysis of the social phenomenon called law."[24]

The emphasis of these scholars that jurisprudence is the theoretical part of law is an exaggeration. Equally true is the fact that jurisprudence is a term normally used in relation to knowledge of statutory law. Also, although one of its dictionary definitions is 'philosophy of law', that is not its usual meaning in current usage, and therefore, to accept this definition in its entirety is to set up an expectation here which is not met. It is suggested that jurisprudence be seen as possessing a dual nature: one which emphasises professionalism in relation to the practice of law, and also the theoretical dimension which is in consonance with the philosophical underpinnings of law.

The question then is 'what is law?' If jurisprudence is concerned with the nature of law, then it follows that a complete jurisprudential analysis should lead to an understanding of what its object of study is. The answer to the question 'what is jurisprudence?', as already noted, however, remains as uncertain and inconclusive just as the question it is meant to answer. It means therefore that the perplexity of the subject matter of law is as engaging as the perplexities of the concept of jurisprudence.

Thus, it could be right to say that the problem of jurisprudence is problem of ascertaining the nature and content of law. This is why Hart, for instance, believes that the question 'what is Law' is perhaps the most difficult question ever asked in the history of human society. In the words of Hart, "No vast literature is dedicated to answering the questions 'what is chemistry?' or 'what is medicine?' as it is to the question 'what is law?' For Hart, therefore, the question of what law is, is one of the

[24] Richard Posner, *The Problems of Jurisprudence*, Cambridge, Massachusetts: Harvard University Press, 1991, p. xi

perplexities of legal theory.[25] The conceptual problems involved in this seemingly simple question provide the basis and the format for articulating and discussing the various divergent opinions on the subject matter of jurisprudence.

In mainstream legal writings, for instance, Lord Bryce divides jurisprudence into four branches: Analytical jurisprudence, Historical jurisprudence, Ethical jurisprudence and Comparative jurisprudence. In a somewhat different sense, Professor Stone suggests three divisions. These are analytical, sociological (or functional) and teleological jurisprudence.[26]

Following the analytical tradition, Bentham and Austin gave jurisprudence a technical meaning[27]. For them, jurisprudence consists in the analysis of law and legal concepts rather than in discovering its contents. In other words, the proper task of jurisprudence is the formal analysis of law and concepts that convey them rather than the substantive analysis in terms of contents and goals.

In this case, Bentham and his disciple, John Austin, conceived of jurisprudence, as the analysis of the distinction between law 'as it ought to be' and 'law as it is.' The latter is the primary and noble subject matter of jurisprudence. A consideration of 'law as it is' requires that we accept that a law exists before a conception of its normative value i.e. 'as it ought to be'. The bane of the history of jurisprudential analysis, according to Austin, is the obsession with the question of law in its normative import.

---

[25] See Hart, H.L.A. *The Concept of Law* Oxford: Clarendon Press, 1961, p. 1.
[26] See *Chamber's Encyclopaedia*, New Revised edition, Vol. VIII, London: International Learning Systems Corporation Limited, 1969.
[27] Jeremy Bentham distinguished between what he called censorial jurisprudence and expository jurisprudence: the former he regarded as a branch of morals, being the principles upon which men's actions were to be directed to the greatest quantity of possible happiness by rules of a permanent kind, while the latter was concerned with law as it is, without regard to its moral or immoral character. According to John Austin the science of jurisprudence is concerned with positive laws, or with laws strictly so called, as considered without regard to their goodness or badness, Lloyd's Jurisprudence, 1994:208, 251.

According to Austin, the normative and analytical dimensions of jurisprudence should be separated. This is because the central concern of jurisprudence is with the law that actually 'is' and not law that 'ought' to be. This distinction is what Austin regarded as the key to the sciences of jurisprudence and morals. This conception is the analytical conception of jurisprudence. It is basically the analysis of legal concepts.

A modern trend in analytical jurisprudence seeks to combine the modern science of semantics with analytical jurisprudence into an analysis of the meaning of legal concepts in the light of their context. Developed in particular by contemporary English jurists, this trend in analytical jurisprudence seems to suggest that concepts such as 'vehicle',[28] 'malice', 'position', etc are to be relevantly understood in their different and varying contexts.

In this case, analytical jurists contend that the meanings of these concepts should be understood to depend on the contexts in which they are uttered or used. They have a core of settled meanings and a penumbra of less settled meanings. These penumbra cases are to be unravelled by a consideration of the fact that the contexts in which the words are used offer useful insights and exegesis into their meaning[29].

[28] Professor Hart gave a typical and insightful example of a penumbra case in the following: "A legal rule forbids you to take a vehicle into the public park. Plainly this forbids an automobile, but what about bicycles, roller skates, toy automobiles? What about airplanes? Are these, as we say, to be called "vehicles" for the purpose of the rule or not?...Facts situations do not await us neatly labeled, creased, and folded, nor is their legal classification written on them to be simply read off by the judge. Instead, in applying legal rules, someone must take the responsibility of deciding that words do or do not cover some case in hand with all the practical consequences involved in this decision. We may call the problems which arise outside the hard core of standard instances or settled meaning "problems of the penumbra"; they are always with us whether in relation to such trivial things as the regulation of the use of the public park or in relation to the multidimensional generalities of a constitution." Hart, H.L.A. "Positivism and the Separation of Law and Morals" *Harvard Law Review*, vol. 71, No. 4, Feb. 1958, p. 607.

[29] The problem of the penumbra emerged from the critical study of the judicial process with which American jurisprudence has been on the whole so beneficially occupied. Contextual understanding of words that fall under penumbra cases, as advocated by contemporary English Analytical jurists, is one of the several attempts to provide a solution to the problem of penumbra cases. However, the problem of the penumbra seems to have a whole lot of issues attached to it particularly in American jurisprudence. One of such issues, according to Hart, is the view that the problem of the penumbra affords an independent distinctive American criticism of the separation of 'the law that is' from 'the law that ought to be'. The problem of the penumbra is a distinctive American critical response and contribution to the

This trend in analytical jurisprudence, which can be termed contextualist jurisprudence, draws a correlate and parallel in the contextualist perspective in epistemology.[30]

This train of thought representing the foundation of the analytical school of jurisprudence has, however, been subjected to rigorous attacks, especially with the emergence of several conflicting ideologies and the outbreak of political tension towards the close of the 19th century. The obvious difficulties and the practical absurdities and implications that Austin's analyses have led to a multiplicity of interpretations and conceptions of jurisprudence.

Jurisprudence, arising from this, was used in a broader sense to mean the lawyer's examination, perceptions, ideals and technique of law. This caption establishes the most widely held view of jurisprudence by Julius Stone. According to Stone, jurisprudence is the "lawyer's examination of the precepts, ideals and techniques of the law in the light derived from present knowledge in disciplines other

---

Utilitarians' position that law and morals be separated. It is said that the Utilitarians' emphatic insistence on the separation of law as it is and law as it ought to be could only have been written this way because they i.e. the Utilitarians' (Bentham and Austin) misunderstood or neglected the process of judicial reasoning i.e. what judges do when they are faced with the problem of penumbra. Contextualist Analytic Jurisprudence, therefore, would be a reaction to this American criticism of Bentham and Austin's insistence on the separation of law and morals.

[30] Contextualism in epistemology is a reaction to the foundationalist programme sustained and promoted in traditional epistemology. A major proponent of contextualism is Ludwig Wittgenstein. Traditional epistemology seeks for an idea that is certain, indubitable and clear in all instances. The inability to discover such an indubitable and impregnable truth led traditional epistemology to a deadlock, a dead-end. Contextualism, as a reactive theory, posits the view that there are contextual parameters essential to justification of beliefs. For contextualists, what matters in justification is "contextual sufficiency of evidence". Knowledge is justified true belief and a true belief is justified if the person who holds it has contextually good reasons. Contextualism views knowledge as correct information in a relevant contextual sense. A good information must be adequate; it need not be necessarily complete. An information that is adequate for a given moment though inadequate in another context still passes for knowledge. Complete information and conclusive evidence are only found in the relation of ideas i.e. truth of logic and mathematics. Contextual adequacy is what is needed. The amount of evidence that is adequate for a particular knowledge claim by one person may be grossly inadequate for another depending on the relative context. This can be termed ***Contextual Relativism.*** For detailed discussions of this theory of epistemic justifications, see Ludwig Wittgenstein, *On Certainty*, G. E. M. Ascombe and G. Von Wright, (Trans.) (Oxford: Basil Blackwell, 1974); Ludwig Wittgenstein, *Philosophical Investigations*, G. E. M. Ascombe (Trans.) (New York: Macmillan, 1958); see also D. Annis 1978 "Contextualist Theory of Epistemic Justification" in *American Philosophical Quarterly*, Vol. 15, No. 3 (July) pp: 213-219, and M. Oke, "Contextualism" in his *A Critical Study of the Viability of Phenomenalism as an Alternative Theory of Perception* (Unpublished) PhD (Philosophy) Thesis; O. A. U., Ile-Ife, 1990.

than the law. It is an attempt, which always remains imperfect, to fulfil for the law the object strikingly posed by the late Mr. Justice Holmes of showing "the rational connection between your fact and the frame of the Universe. To be master of any branch of knowledge you must master those which lie next to it."[31]

The novelty of this conception, however, is dampened by the fact that it limits the task of jurisprudence to be the exclusive activity of the lawyer. In modern times, jurisprudence is concerned with an examination of the nature and functions of law, its credibility, justification and legality. According to M.D.A. Freeman, "jurisprudence involves the study of general theoretical questions about the nature of laws and legal systems, about the relationship of law to justice and morality and about the social nature of law".[32] In a broader perspective, jurisprudence and its subject matter encompass the philosophical, sociological, and historical as well as the analytic components of law. According to Harris

> *Jurisprudence is a rag bag into which is cast all kinds of general speculations about law and its functions. It asks questions about the value of law. How is it to be improved? Is it indispensable? Who makes it? Where do we find it? What is the relation of law to morality, justice and social policies?*[33]

It is within this broad spectrum that jurisprudence encompasses sub fields of studies such as legal theory, legal philosophy etc. In a general sense, all these academic and intellectual disciplines overlap and are collapsible into each other. It enquires into the nature of law by drawing attention to the basis of law and its operation. Philosophy of law, in this sense, is parasitic on other areas of philosophy such as ethics, social and political philosophy, metaphysics and the philosophy of language. According to Riddall, "jurisprudence rubs shoulders with and shares common

---

[31] Julius Stone, *Legal Systems and Lawyers' Reasoning* California: Stanford University Press, 1964, p. 16.
[32] M.D.A. Freeman, *Lloyd's Introduction to Jurisprudence*, London: Sweet and Maxwell, 1996, 6th Edition, p. 4.
[33] J.W. Harris, *Legal Philosophies* London: Buttersworth and Co. Publishers, 1980, p.1.

ground with ethics, politics, history, theology, and philosophy"[34]. As a dynamic discipline, it responds to new evidence affecting men's perception of the meaning, nature and purpose of law in the society.

Historically, there have been and there still are different orientations and worldviews in the attempt to understand the nature of law and its function in every relevant society. This is premised on the fact that men have not always held the same view about law and its overall place in societies. Men's perceptions concerning what law is have been essentially different. These different perceptions have been the birth place of several orientations in ancient as well as contemporary jurisprudence. And what is more, the different orientations cannot be extricated from certain philosophical worldviews and experiences. In fact, all kinds of experiences are of relevant importance. This applies, very crucially, to the idea of law.

It is no wonder then that Justice Oliver Wendell Holmes Junior retorted that "the actual life of the law has not been logic, it has been experience".[35] In the same vein, Carl Friedrich once asserted that:

> *Only by taking account of all the different kinds of experience can we give an image of the law adequate to reality and at the same time general. Only then can a comprehensive jurisprudence be developed.*[36]

The leading theories and thoughts on jurisprudence are legal positivism, legal naturalism, and legal realism. There are other distinctive theories of law. There are, for instances, the pure theory of law, the sociological theory of law, the Marxist theories of law, the historical theory of law. In recent times, many reactive jurisprudential theories, such as postmodernist jurisprudence, feminist jurisprudence, have been added to the list of several orientations in mainstream jurisprudence.

---

[34] Riddall, op. cit. P. 5
[35] Holmes, O.W. *Common Law*, 1938, p.1.
[36] Friedrich, C.J. *The Philosophy of Law in Historical Perspective*, Chicago: University of Chicago Press, 1963, p. 7.

The first three are often seen as the starting point of analyses in legal thought. Many reasons account for these. One, the long antecedence of historical debates and controversies between them and the modern realities they tend to approximate or deny; two, most of these other theories do not consider the very good dove-tailing philosophical questions in the controversial sense in which these three theories consider and tend to answer them; other theories consider other substantial dimensions of the law e.g. historical, societal, class, purposive, or gender dimensions of law.

1. 3 ORIENTATIONS IN JURISPRUDENCE

Historically, there have been and there still are different orientations and worldviews in the attempt to understand the nature of law and its function in every society. This is premised on the fact that men have not always held the same view about law and its overall place in societies. Men's perceptions about law and the different orientations that have grown out of these perceptions cannot be extricated from their overall philosophy and experiences. In the important sense, therefore, all kinds of experiences are of relevant importance in the understanding of law and the theoretical and practical premises on which it is based. The experiences in question may be rooted in metaphysical, positivist or pragmatic frameworks. These frameworks provide a degree of intelligibility and meaning to these experiences.

Contemporary jurisprudence is observably thickened by different orientations. Apart from the fact these orientations have grown out of the different philosophical worldview under which men live, these different orientations are also accountable for in the light of the fact that the very nature of the subject matter of jurisprudence is becoming a thing of challenge and dispute. This challenge has to do with the nature of the struggle between the speculative nature of classical jurisprudence and the specific and scientific nature of modern jurisprudence. The contemporaneous nature of

jurisprudence is thus beleaguered with a number of dilemmas each advocating and drawing the nature of the struggle between mere speculation about law to specific concerns about the nature of the impact and influence of law on contemporary society. Some of these orientations are outlined in the subsections below.

1.3.1 ANALYTICAL JURISPRUDENCE.

The contemporary interest in analytical jurisprudence is one of the enduring contributions of the positivist's school to the field of jurisprudence. Analytical jurisprudence is the rigorous application of the techniques of linguistic analysis in the clarification and analysis of legal and jurisprudential concepts. Even in the law courts, the importance of analytical jurisprudence in the understanding and analysis of concepts such as malice, domestic violence, rape, etc. has been justly recognised, acknowledged and applied.

Even though Austin's positivism was an attempt to provide a thorough analytical frame within which the concept of law can be freely discussed, his obsession with the notions of sovereignty and commands marred the fine synthesis and mathematical possibility of his analytical jurisprudence. It shows that, in a way, jurisprudential discourses, whether framed in the context of analytical or normative jurisprudence, is essentially concerned with the search for results.

If Austin had succeeded, it would have been proper to regard him as the father and founder of analytical jurisprudence, particularly, as the present array of legal philosophers have come to know and accept it. However, contemporary analytical jurisprudence, as spearheaded in positivism and as recognised in legal philosophy today is often attributed to the intellectual efforts and contributions of H. L. A. Hart. For obvious reasons, Hart is to be given much credit for closing the gap between jurisprudence and analytical philosophy.

The immediate result of that conflation between jurisprudence and analytical philosophy consists in the fact that there emerged considerable range of works in jurisprudence and philosophy that helped to facilitate a broader understanding of the concept of law. These broader intellectual understanding of law was undertaken by several substantial figures such as Joseph Raz, Ronald Dworkin, John Finnis, and Neil MacCormick. In recent times, scholars such as Jules Coleman, Brian Leiter, Scott Shapiro, Andrei Marmor, owe their positivism and the analytical persuasion to the work of H. L. A. Hart.

According to Brian Leiter, the significance of analytical jurisprudence can be seen in the behemoth of consistent analysis on a wide range of topic such as criminal law theory, the conceptual and moral foundations of private law, the elucidation of central concepts of abstract legal theory (such as authority, reasons, rules and conventions); the revival of natural law theory; and the exploration of the implications of philosophy of language, metaphysics, and epistemology for both traditional issues of legal philosophy and for fresh explorations of the foundations of various fields of substantive and adjective law.[37] It is possible to add to the many advantages of the marriage between analytical philosophy and jurisprudence, courtesy of Hart, in the areas of legal and political theory, principally in theorising liberal democracy and justice.

There is then a two-fold dimension to the fortune of analytical jurisprudence owing to the scholarly efforts of Hart. In the first instance, there is an extensive and sophisticated growth in literature on jurisprudence or legal philosophy than at any other time in the history of the discipline. In other words, there is the spontaneous evolution of a multidisciplinary approach to the study and understanding of law and

[37] Leiter, B. "Naturalism in Legal Philosophy" in *Stanford Encyclopedia of Philosophy*. Stanford: Stanford University Press, 2004, pp. 166-170.

concepts that are cognate to it. In the second instance, there exists a lively, loosely-knit inter-disciplinary community that includes philosophers interested in law. In other words, there is thus a large and quite varied pool of talent that is well-equipped to tackle a fresh range of issues.

The increasing interest in analytical jurisprudence is a serious and fundamental challenge for the legal profession, especially in Africa. It calls on legal scholars to pay particular and peculiar attention to the importance of concepts, uses of words in deliberations of legal crisis and problems. The description and understanding of legal problems could be overtly misunderstood owing to the ambiguity, vagueness, and opacity of the concepts in which those problems are presented. This makes the correct application of concepts and ideas of critical importance, especially when we consider the role of reason and logic, based on the use of words, in the nature of judicial procedures and decisions. This is of very special importance for the African judiciary and legal scholars in view of the fact that they have to work with foreign languages.

Notwithstanding its numerous successes, there has in recent years been a mounting awareness of discontent with the leading approach of analytical legal philosophy both within and outside its somewhat closed circles. Some of these criticisms are that: (i) that analytical legal philosophy has become too detached from ordinary legal scholarship and legal practice; and (ii) that the agenda of issues addressed by mainstream analytical philosophers is too narrow.

The first set of criticism against analytical jurisprudence, in recent times, is associated with Ronald Dworkin. The general statement expressing this displeasure consists in the fact that analytical jurisprudence has removed the understanding of law away from the practical level to the abstract level. According to Twining, much

legal philosophy has become too abstract, too esoteric, and perhaps too sophisticated to contribute much to the health of the discipline. In short, analytical legal philosophy has become a subject apart.[38] Dworkin, on his part, sees the limitation of analytical jurisprudence to consists in the fact that "positivists are drawn to a conception of law not for its inherent appeal, but because it allows them to treat legal philosophy as an autonomous, analytic, and self-contained discipline."[39] One needs to be perceptive enough to understand the substance of Dworkin's critique against analytical jurisprudence. If our perception is right, what Dworkin seems to have against analytical jurisprudence is that positivists attempt to separate the link between law and other normative social institutions. This is done through recourse to language and conceptual analysis alone while rejecting the practical aspects of legal study. A neglect of practice will stultify, Dworkin seems to be saying, our understanding of law.

Furthermore, Dworkin claims that analytical legal philosophy makes "little attempt to connect their philosophy of law either to philosophy generally or to substantive legal practice, scholarship, or theory."[40] While the second aspect of this criticism is quite evident, we tend to think that the first aspect of Dworkin's attack is exaggerated. This is because no matter how conceived legal philosophy is part and parcel of general philosophy since it is the adoption of the technique of philosophy to one area of general interest to philosophy which is the nature of law. We might even say that legal philosophy, from the perspective of analytical jurisprudence, is an excessive obsession with the techniques of philosophy without relating it to the practical aspects of the study of law.

Dworkin's objections to the importance of analytical jurisprudence have been objected to both by positivists and non-positivists. For example, Brian Leiter criticized

[38] Twining, W. *Law in Context: Enlarging a Discipline* Oxford: Oxford University Press, 1997, Ch. 7.

Dworkin's objections as wrong-headed, deeply implausible, and largely irrelevant to some lively areas of legal philosophy that Dworkin has ignored.[41] In another thoughtful essay, Andrew Halpin agrees with the thrust of Dworkin's critique, extends it to Leiter in respect of divorce from practice, but goes on to argue that Dworkin is no more in touch with legal practice than his rivals.50 The central point is that Dworkin and Raz have each elected to emphasise only one characteristic of legal practice in a way which does not give an account of actual practice, but "is rather a theoretical perspective on what law might be if one were to share the theorist's perspective."[42] In his words, Halpin states that:

> *Dworkin's choice of the characteristic of deploying normative argument clearly avoids Raz's particular error, but in a more subtle way he makes the same mistake of grounding methodology for his theory on an artificially isolated characteristic of the practice of law. Whereas Raz precluded the controversies of practice from his theoretical enterprise by insisting on a methodology that avoided engaging in moral argument, Dworkin is open to normative or moral argument. However, Dworkin too precludes the controversies of practice. He does this by diverting his methodology in order to construct a theory of normative argument that will provide authoritative and conclusive reasons for recognising particular determinations of social relations: producing a coherent theory to account for the "right answer" in every established and future case. Dworkin's enterprise is equally speculative in working towards a theory of law that could provide an authoritative determination of every instance of every social relation, which is as far removed in another direction from the actual practice of law as Raz's enterprise. Raz departs from the controversies of practice for a theoretical exposition of law without moral controversy; Dworkin departs for a theoretical destination where all moral controversy is resolved.*[43]

Notwithstanding the above, analytical jurisprudence has equally been charged with the problem of narrowness. The charges of narrowness relates to three central issues which are (i) narrowness of focus, (ii) narrowness in conception of law, and (iii) narrowness in geographical reach. These hordes of criticisms have been responsible for

---

[39] Dworkin, R. "Thirty Years On", 115 *Harvard Law Review,* 1655 Coleman, 2001, p. 1656.
[40] Ibid., p. 1678.
[41] Leiter, B. "The End of Empire: Dworkin and Jurisprudence in the 21st Century", 36 *Rutgers L. Journal,* 2005, p. 165.
[42] Halpin, A. *Thirty Years off the Point: The Methodology of Jurisprudence*, Oxford: Hart, Oxford, 2005, p. 20.
[43] Ibid., p. 20.

the emergence of other trends in jurisprudence. These trends, no doubt, adopt different approaches in the understanding of jurisprudence.

1.3.2 SOCIOLOGICAL JURISPRUDENCE OR THE SOCIOLOGY OF LAW.

Sociological jurisprudence is concerned with the practical understanding of the application of law in the realities of everyday life. The re-emergence of sociological jurisprudence has provided the space for the practicalisation and empirical verification of the theoretical premises on which the great figures in sociology such as Weber, Emile Durkheim, Marx and even Comte arrived at their conclusions about societies and the relevance of those premises in the area of law.

Precisely, sociological jurisprudence is concerned with the study of law in action. In other words, it is that of understanding what really happens, why it happened and how it happened. The emphasis of sociological jurisprudence is thus an attempt to banish the jurisprudence of concepts in the modern understanding of law since formal, logical and conceptual analyses of law have produced problems for which existing laws could not provide solutions for. Sociological jurisprudence thus speaks of the social reality of law, with social justice as its ultimate goal.

1.3.3 THE JURISPRUDENCE OF JURIMETRICS.

The term 'jurimetrics' was introduced by Lee Loevinger. The concern of Jurimetrics is the empirical study of the law in the widest sense. This includes not only the form but also the meaning and pragmatic aspects of law[44]. Law is defined here as the demands and authorisations issuing from state organisations. This definition is theoretically sustainable as it defines what the basic object of investigation is for the legal scientists: legal texts[45].

---

[44] L. Loevinger, *Jurimetrics, The Next Step Forward,* 1949, in: Minn. Law Rev., april 1949, p. 455

[45] Richard De Mulder and dr. Kees van Noortwijk "More science than art: Law in the 21st century," presented at the 12th BILETA Conference

Jurimetrics research uses a model building approach. By this is meant that an attempt is made to express the theory in mathematical, such as statistical, models. This usually entails quantification, often unavoidable, because of the necessity of calculating probability. The main stream in jurimetrical research has always been based upon the work of the North American "legal realists".

Even though jurimetrics is an attempt to break away from jurisprudence, it is still an essential part of jurisprudence. This is because it is interested in the extension of one aspect of the field of study called law. One way or the other, it is still connected with jurisprudence. According to Lee Loevinger, what then becomes of interests to the institutions of law that achieve progress is not just mere speculation about law but essentially a scientific approach to law and related legal problems. The point of distinction therefore becomes one of method and not one of attitude. He stressed the importance of scientific, and therefore quantitative methods, for lawyers.

For Loevinger, whereas jurisprudence has been more speculative, jurimetrics is more scientific. In other words, mere speculation about law, i.e. jurisprudence, is a moribund exercise and should be done away with for the sake of progress. In his words, "the next step forward in the long path of man's progress must be from jurisprudence (which is mere speculation about law) to jurimetrics - which is the scientific investigation of legal problems."[46]

Jurimetrics studies the form, the meaning as well as the pragmatics of the law. Most of the work done in the field has been involved in the systematic and quantitative analysis of judicial decision-making, as could be found in the work of the Northern American "legal realists". By analysing large and preferably representative

---

on *The Future of Legal Education and Practice*, Monday, March 24th & Tuesday, March 25th, 1997, Collingwood College, University of Durham, http://www.bileta.ac.uk/97papers/97-7.html.

collections of cases, they tried to predict judicial decision making. Unfortunately for them, the selection of adequate cases had to be done by hand and the same is true for the coding of the cases according to the presence and absence of facts.

Novel as this is, the fact remains that an appreciable amount of theoretical finesse is still needed to maintain the balance of the nature of legal problems and studies. It is contended that crucial to science at a point is the utility of speculation. In recent times, however, the jurimetrics front has become rather quiet since the last legal realist stopped being active. Perhaps it is fair comment to remark that it is the Netherlands where jurimetrics has enjoyed the most interest.[47]

1.3.4 POSTMODERNIST JURISPRUDENCE

Arising from postmodernism in general, as it were, postmodernist jurisprudence is a rejection of modernist jurisprudence. An understanding of postmodernist jurisprudence thus presupposes an understanding of postmodernism itself, which is one of the most influential philosophical doctrines to emerge in the history of western philosophy. In general, apart from being a western invention, it is, in the primary sense, a reactive theory. As a reactive theory, it cuts across various disciplines such as jurisprudence, epistemology, ethics, political and social philosophy, literature and critical theory etc. In the last half of the twenty-first century, postmodernism, apart from feminism, appears to have had dramatic influence on practical and conceptual responses to the problems of our modern world.

---

[46] L. Loevinger, *Jurimetrics, The Next Step Forward*, 1949, in: Minn. Law Rev., april 1949, p. 455

[47] Richard De Mulder and dr. Kees van Noortwijk "More science than art: Law in the 21st century," presented at the 12th BILETA Conference on *The Future of Legal Education and Practice*, Monday, March 24th & Tuesday, March 25th, 1997, Collingwood College, University of Durham, http://www.bileta.ac.uk/97papers/97-7.html.

There have been many ways in which postmodernism as a project has been cast. In its conceptual form, postmodernism is the rejection of the project of modernism that began with the Cartesian quest and search for a single absolute truth. Philosophy is thus a primary target of the postmodernist critique. For postmodernists such as Jean Francois Lyotard and Richard Rorty, there no longer exists Philosophy with a capital P. There are only philosophies. There is no longer Truth, only discourses. There is no centre, only rapidly expanding margins.[48]

According to Lyotard, postmodernism designates a general condition of contemporary Western civilisation. It sees as non-existent in Western civilisation "grand narratives of legitimation", that is, some set of overarching philosophies of history such as the Enlightenment story of the gradual but steady progress of reason and freedom, Hegel's dialectic of Spirit coming to know itself, and Marx's idea of a progressive march towards a utopia through a class revolution. What is repulsive for Lyotard and other postmodernists is the fact that these explanations of the universe are merely meta-narratives giving credence to modernism in the interpretation of the problem of legitimation.

The implication of this is the view that for postmodernists, legitimation, whether epistemic, moral, jurisprudential or political, no longer resides in philosophical meta-narratives rendered in universalistic and absolute terms. Rather, for postmodernists, legitimation of first-order situations is to be grounded in plural, local and immanent conditions. Hence, universal notions of justice, law, democracy, citizenship no longer exist but multiplicities of justice, jurisprudence, democracy and citizenship. According to Fraser and Nicholson, Lyotard's project can be seen as "the offering of a normative vision in which the good society consists in a decentralised

[48] Robert Solomon and Kathleen M. Higgins, *A Short History of Philosophy*, New York: Oxford University Press, 1996, p. 300

plurality of democratic, self-managing groups and institutions whose members problematize the norms of their practice and take responsibility for modifying them as situations require."[49]

In consequence, postmodernism sponsors and celebrates the project of fragmentation in the world. This means a fragmentation of cultures, of meaning, of politics and political concepts, of ethics and moral truths, of the idea of justice,[50] In this sense, postmodernist jurisprudence and politics elicit and accommodate the idea of splintered legal and moral ideals. In concrete terms, pluralism becomes a fresh, innovative agenda and thesis of postmodern jurisprudence and politics. Postmodern philosophy is thus positive for African legal systems. Concerning any important issue, it tries to give renewed vigour to the recognition of the rights of each group to a stake in legal understanding and the legal system as a whole. The emphasis is on legal pluralism. In the words of de Sousa Santos, there is the decentralisation of the state by "pointing to the plurality of legal orders, both state and non-state existing in the same political space."[51] The overall effect is the success in projecting and developing a new paradigm in the understanding of the legal subject and the legal system. It takes the notion of jurisprudence and its central connection to existing normative systems in each society away from its foundationalist structures built on the idea of universality to its contingent, partial and plurally situated character, thereby making room available for what was conceived hitherto in an exclusionary manner. The gain therefore is the exposure of groups to a sense of meaning and belonging.

---

[49]Nancy Fraser and Linda Nicholson, "Social Criticism without Philosophy: An Encounter between Feminism and Postmodernism" in *Feminist Social Thought: A Reader*, edited by Diana Meyers, New York: Routledge, 1997, p. 135.

[50] Solomon and Higgins, p. 300-01

[51] See B. de Sousa Santos, (1992) 1 *Social and Legal Studies* 131, p. 133.

1.3.5 FEMINIST JURISPRUDENCE

In recent times, feminist jurisprudence has been added to the popular and famous list of theories and trends in mainstream jurisprudence. In essential terms, feminist jurisprudence has often been described as a reactive theory. Its reactive nature is established and confirmed by the nature of its history, claims, evolution and development. Feminist jurisprudence is an attempt to construct and establish the place and the role of law with respect to feminist agitations. The basic link or connection between feminism and jurisprudence is to be located in the nature of conceptual frameworks, especially oppressive patriarchal ones.

According to Jane Scoular, feminist jurisprudence is an attack on the centuries of protection afforded men against women in what is termed a patriarchal legal system.[52] Essentially, feminist legal theory has been primarily reactive, responding to the development of legal equality theory. In very radical terms, feminist jurisprudence can be regarded as the revolt against the "habit of obedience" in societies which treat the female gender and issues of central concern to them as a microcosm of both the well-ordered state and "pious congregation" with the male standing in for civil and divine authority.[53] In a nutshell, it is an invitation to a consideration of the complex and troubling relationships between the feminine gender and the law, as well as the different meanings that justify legal inequality in different cultural contexts.[54]

The controversy between masculine jurisprudence and feminist jurisprudence is one of the lively debates in contemporary jurisprudence. In whatever way it is conceived, the outcome of the controversy is important because in its resolution lies the emergence of a truly humanist jurisprudence which promotes the equality of the

---

[52] Scoular, J. "Feminist Jurisprudence" in *Contemporary Feminist Theory* edited by Stevi Jackson and Jackie Jones, Edinburgh: Edinburgh University press, 1995, p. 62.
[53] See Idowu William, "Feminist Epistemology of Law: A Critique of a Developing Jurisprudence" in *Ife Juris Review*, Vol. 1, 2004, p. 16.

sexes. Thus, for feminist jurists the equality of the sexes in relation to the law has been a nightmare considering the dominance of masculine jurisprudence. At the heart of masculine jurisprudence is what Robin West calls an endorsement of the separation thesis. The separation thesis is the view that human beings i.e. men and women are materially and physically separate from each other, and that this separation is of fundamental importance in the understanding of the nature and origin of law in human society.[55]

The claim of feminist jurists therefore is the view that contemporary jurisprudence is essentially patterned on masculine qualities and tendencies. According to Robin West, the masculinity of contemporary jurisprudence can be established on two fronts: one, values, dangers and fundamental contradiction that characterise women's lives are not reflected in jurisprudential doctrines and theories; two, the legal theories and doctrines which explicate the relation between law and human life in general have all been about men and not women.[56] In her conclusion, contemporary jurisprudence is masculine in as much as it regards the experiences of women as secondary to what the law is interested in. in her words:

> *Jurisprudence is "masculine" because jurisprudence is about the relationship between human beings and the laws we actually have, and the laws we actually have are "masculine" both in terms of their intended beneficiary and in authorship. Women are absent from jurisprudence because women as human beings are absent from laws protection: jurisprudence does not recognise us because law does not protect us...the virtual abolition of patriarchy is the necessary political condition for the creation of non-masculine feminist jurisprudence.*[57]

[54] Ibid., p. 16
[55] West, R. "Jurisprudence and Gender" (1988) 55 1, *University of Chicago Law Review*,1-72.
[56] West, R. "Jurisprudence and Gender" (1988) 55 1, *University of Chicago Law Review*,1-72.
[57] West, R. "Jurisprudence and Gender" (1988) 55 1, *University of Chicago Law Review*,1-72.

1.3.6 GLOBALISATION AND JURISPRUDENCE

The reverberations of globalisation all over the world constitute one of the most innovative and inventive jurisprudential orientations in contemporary times. The importance of this jurisprudence lies in the fact that it is an invitation to an unrelenting controversy, in an empirical sense, with what can be called 'nation-states' jurisprudence. The nature of the controversy consists in the actual and implied transference of authority from the local to the global. It is not too clear how this transference is to be made possible since it is obvious that the difficulty inherent even in local legal system and jurisprudence is breathtaking not to talk of the existence of a global one. According to William Twinning, globalisation presents three specific challenges to traditional jurisprudence:

1. It challenges "black box" theories that treat nation states, societies, legal systems, and legal orders as closed, impervious entities that can be studied in isolation;

2. It challenges the idea that the study of law and legal theory can be restricted to two types of legal ordering: municipal state law and public international law, conceived as dealing with relations between sovereign states;

3. It challenges the adequacy of much of the present conceptual framework and vocabulary of legal discourse (both law talk and talk about law) for discussing legal phenomena across jurisdictions, traditions, and cultures.[58]

Clearly, therefore, it is not a misnomer to contend at the outset that globalization has in its wake a transformation of not just the legal systems of nation-states but also the emergence of a new dimension of jurisprudence on the international scene.

Even though the idea is more or less associated with what Eric Hobsbawm calls the global entity, a single economic unit, it must be realized that globalization is not restricted to the economic scene alone. As a matter of fact, globalization is

[58] Twinning, W. *Globalisation and Legal Theory*, London: Butterworth, 2000, p. 252.

encroaching on received notions and understanding in the areas of information technology, bioethics, human rights, citizenship, politics, culture, identities, law, sports and a whole lot of the gamut of daily life. As an historical process, it carries along with it the entire sphere of historical meaning attached to existent values.

Ordinarily, globalization stands for the view that the world is a global village. This is what the Washington Post described as the *death of distance*. Furthermore, it elicits the growing tendency towards the universalization and universal homogenization of ideas, values and even life styles. It depicts the emergence of a New World Order in almost every realm of human knowledge production - arts, humanities, ethics, religion, technology, law etc. Commenting on the conceptual and practical dimension of globalization, McGrew posits that globalization refers to:

> *The multiplicity of linkages and interconnections that transcend the nation-state which make up the modern world system. It defines a process through which events, decisions and activities in one part of the world can come to have significant consequences for individuals and communities in quite distant parts of the globe.*[59]

How then do we conceptualize globalization? According to Francis Fukuyama, globalization could be seen as a systematic process to universalize liberal orthodoxy. The central ideas of liberal orthodoxy are liberal democracy and economic liberalism. Based on Fukuyama's analysis, two central objectives appear intestinal to the globalization process as advocated and propagated in the west. These are: the domination of the world and a covert and perpetual hold on the advancement of the developing world especially Africa.

The push and pull of modern day jurisprudence is the struggle for prominence between the emergence, growing awareness and evolution of what is termed a postnational or transnational jurisprudence, and existing legal ethos which make up

the present structure of nation-states jurisprudence. In the present world, the reverberations of globalization and the quest for a transnational or postnational jurisprudence is clearly posing a fundamental challenge for the nature and structure of nation-states jurisprudence. The dilemma between these two strands of jurisprudence can be demonstrated in many ways.

For example, the idea of globalization is sponsoring a postnational jurisprudence conveniently based on the idea of a universal law, not national law or nation-state laws. The foundation for this kind of jurisprudence is one premised on the fact that the status and standing of the individual, the nation-state itself and the emerging World Order is determined by the changing dialectics of the relationship between them. The implication of this trend for the notion of nation-states consists in the view that claims of citizens concerning legal provisions are often viewed not in the light of national laws but on the increasing notion of the universality of laws and enactments as championed by the dynamics of globalisation. As such, rather than see issues in the light of the legal culture and ideas prevalent in that national system or culture, due to the emergence of the global World Order, courtesy of globalisation, the relationship of the individual and the state itself is no longer defined in terms of national, positive laws but in the light of universal laws.

Obviously, a transnational jurisprudence negates and runs contrary to one of the revered principles of states' relationship with each other, which is the principle of state sovereignty. The basic clue to the perfect and academic understanding of this fact is that, at a faster rate, globalisation policies, ethos and ideals are challenging, eroding and constraining the idea of state sovereignty and laws leading gradually to the emergence of a transnational jurisprudence.

---

[59] McGrew T., "A Global Society" in S. Hall, D. Held and T. McGrew (eds.) *Modernity and its Futures*, Cambridge: Polity Press, 1992, pp. 13-14.

Internal and external pressures are mounted on states to conform, thereby abandoning or undermining old notions about laws, rights, justice and even the idea of citizenship and in the process, evolving or creating a new set of concepts. This conceptual position observes that a decline in the nation-state conception of jurisprudence leading to the emergence of post or transnational jurisprudence is one of the dilemmas of contemporary jurisprudence.

One way of showing and validating the pessimism inherent in this dilemma consists in the view that citizens of such nation-states look up to ideas of laws peddled by the Globalising World Order as basis for certain actions and defences thereby incapacitating the notion of laws as relevantly provided in the country's ethos and legal culture. Consequently, the national life of such a country's jurisprudence is being challenged not just by the emerging Global World Order but also by the actions and inactions of its citizens who are invoking the principles and ideals of universality of laws as grounds for certain claims, privileges and advantages. The idea of universal brotherhood, for example, can be used in this sense to question the laws and policies of the national government in such countries on the issue of migrants, aliens and the benefits of citizenship.

The obvious conclusion on this dilemmatic trend in contemporary jurisprudence is the view that national jurisprudence as contained in each country's legal history is being eroded by the legal ethos and values of a globalising world. And what is more, state sovereignty which is a basic and central idea of membership of World bodies and organisations becomes subject to the harassment of globalisation and impliedly, of the forces of international capitalism, a major instrument of the threat of globalisation. The struggle and the dilemma of contemporary trends in jurisprudence can be seen in the unbalanced co-existence of these two jurisprudences.

1.4. SOME PERSISTENT PROBLEMS AND QUESTIONS IN JURISPRUDENCE

The field of jurisprudence is not only replete with instances of different orientations but also persistent problems and questions. The unresolved nature and definitions of philosophy in general reveals a lot about the philosophical underpinnings of these persistent jurisprudential problems. In the history of debates in legal philosophy, different understanding of the nature of these persistent problems has been brought to bear on the nature of jurisprudence at large. Thus, for instance, to understand jurisprudence in totality is to be able to understand these problems as emanating from the unresolved nature of jurisprudence. In fact, the nature of jurisprudence constitutes a very significant source of the nature of jurisprudential problems.

Historically, it appears very strong a view that the questions that legal philosophers have raised over the nature of law are not all to be settled by discovering just what law is. Many of such questions reappear as questions about the legitimacy, grounds, limit and usefulness of law in human society, and its relation, at large, to other social institutions[60] that are necessary for the continuity of human development and societal progress and survival. Such claims are to be severally examined. The way to examine them and what is to be examined constitute the main concern of what P. George Mead regarded as a century of arguments on the question 'what is law?'

To this end, legal philosophers typically ask three major questions. These are

(1) What is the principal nature of law?

(2) What is the relationship of law with morality, justice, religion etc?

(3) What is the scope and limit of law?

The philosophical import of the problem of the nature of law can be understood in several dimensions. In the first place, the problem of the nature of law

is co-extensive with philosophy itself, or perhaps, with the problems of philosophy[61] as a whole. For example, to claim to have a metaphysical theory of law is to invite its epistemology and consequently, its logic. In this sense, it shows that a claim in a less significant area of legal philosophy can essentially be a claim in the epistemology of legal philosophy.[62]

Arising from this, the problem of the nature of law and its epistemology then becomes inescapable. Viewed in its right perspective, the inescapability of the problem of the nature of law and its epistemology may consist in the fact that the epistemological problem of the nature of law is itself one of the manifestations or the true nature of 'The Philosophical Problem'. It is in this sense that one can contend that the epistemological problem of the nature of law as it is evidenced in legal philosophical debates is philosophy in search of itself.

According to Professor Hart, the entire length and breadth of Jurisprudence seems to be anchored on finding a resolution to three recurrent issues; namely, the

---

[60] These include morality, religion, technology, justice, culture, etc.

[61] This assertion, though curious, yet is not peculiarly a strange one. This can be validated in the area of jurisprudence and philosophy of law, for instance. The problems that legal philosophers and jurists have been battling with for many centuries, strictly speaking, are philosophical problems in the larger sense. This is captured, most succinctly, in the following: "the philosophy of law studies philosophical problems raised by the existence and practice of law. It therefore has no central core of philosophical problems distinct to itself, as other branches of philosophy do, but overlaps most of these other branches. Since the ideas of guilt, fault, intention, and responsibility are central to law, legal philosophy is parasitic upon the philosophy of ethics, mind, and action. Since lawyers worry about what law should be, and how it should be made and administered, legal philosophy is also parasitic on political philosophy. Even the debate about the nature of law, which has dominated legal philosophy for some decades, is, at bottom, a debate within the philosophy of language and metaphysics." See Ronald Dworkin, (ed.) *Oxford Readings in Philosophy. Philosophy of Law,* Oxford: Oxford University Press, 1977, p. 1.

[62] Again, the field of jurisprudence and legal philosophy provides an intellectually stimulating example. A modern trend in analytical jurisprudence seeks to combine the modern science of semantics and philosophical epistemology with analytical jurisprudence into an analysis of the meaning of legal concepts in the light of their context. Developed in particular by contemporary English jurists, this trend in analytical jurisprudence seems to suggest that concepts such as 'vehicle', 'malice', 'position', etc., are to be relevantly understood in their different and varying contexts. In this case, analytical jurist contend that these concepts can easily be understood to mean what they are, depending on the context in which they are uttered or used. They have a core of settled meanings and a penumbra of less settled meanings. These penumbra cases are to be unravelled by a consideration of the fact that the contexts in which the words are used offer useful insights and exegesis into their meaning. This trend in analytical jurisprudence, which can be termed Jurisprudential Contextualism, draws a correlate and parallel in epistemological contextualism.

relation between law and coercion, relation between law and morality and the relation between law and rules. In his opinion, however, these three recurrent, cardinal and perennial issues in legal philosophy revolve and cluster around the request for a definition of law or an answer to the question 'what is law?' In the words of Hart, "speculations about the nature of law has a long and complicated history; yet in retrospect it is apparent that it has centred almost continuously upon a few principal issues"[63]

This is why it is contended that the nature of problems in jurisprudence is essentially derived from the unsettled nature of jurisprudence? If the nature of jurisprudence is concerned with what the idea of law is, and the idea and meaning of law is shrouded in unending difficulty, then it follows that the problems of jurisprudence are derived from, or are inherently sourced in, the unending difficulty in the nature of law.

In a somewhat different sense, Friedmann contended that the entire history of legal theory is one of perpetual and undecided struggle between some basic values of life such as the relation between the individual and the universe, the primacy of the intellect over instinct, the supremacy of positivist values over idealistic values, the controversy over collectivism and individualism, the desirability of democracy or autocracy, and the ideals of nationalism as against the ideals of internationalism.[64]

For Friedmann, these ideas and their irreconcilable nature constitute the entire history of legal theory. In his words, "it is between these antinomic values "that human society and legal theory move in a ceaseless struggle. The history of legal thought is not so much one of new ideas as one of a recurring struggle between some

[63] H.L.A. Hart, *The Concept of Law*, Oxford: Clarendon Press, 1961, p. 6.
[64] Wolfgang Friedmann, "Legal Theory" in *Chamber's Encyclopaedia*, New Revised edition, Vol. VIII, London: International Learning Systems Corporation Limited, 1969, pp: 448-459.

basic ideals and the attempt to adapt them, through law, to changing conditions."[65] Even though no problem in jurisprudence is insignificant, this chapter and subsequent ones shall be devoted to a critical appraisal of the persistent problem of the relation between law and morality.

The choice of this problem is not without a basis. One, in the significant sense, the unresolved arguments and debates on the relation between law and morality seems to cut into the heart of other problems in jurisprudence. There seems to be interrelation between this particular problem and other problems. The distinction between law and coercion, for instance, or law and rules or, better still, as Friedmann conceives it, the primacy of the intellect over instinct, all have entailed in them the unresolved question of what the exact nature of the relation between law and morality is. A concise answer to the question of the relation between law and morality is held to be a form of answer to some of the unresolved puzzles inherent in the other problems. For, as Friedmann postulates, "in their search for ideals of justice, legal philosophers have placed their faith either in reason or in instinct. The belief in the supremacy of reason means, in terms of legal theory, the deduction of law from objective principles of justice and logic."[66]

Secondly, the nature of the debate seems to cover the entire history of legal philosophy, such as, from the time of the ancient Greek philosophers to the present modern times. When M. D. A. Freeman contended that jurisprudence is more of a contemporary enterprise than a mere accumulation of ancient wisdom,[67] what is immediately meaningful in this contention is the view that unresolved question about

---

[65] Wolfgang Friedmann, "Legal Theory" in *Chamber's Encyclopaedia*, New Revised edition, Vol. VIII, London: International Learning Systems Corporation Limited, 1969, p. 450.
[66] Wolfgang Friedmann, "Legal Theory" in *Chamber's Encyclopaedia*, New Revised edition, Vol. VIII, London: International Learning Systems Corporation Limited, 1969, p. 449.
[67] M.D.A. Freeman, *Lloyd's Introduction to Jurisprudence*, London: Sweet and Maxwell, 1996, 6th Edition, p. 16.

the role of law in the enhancement and promotion of justice, which was reminiscent of ancient legal and philosophical disputes, is made more relevant today in most jurisprudential discourses.

Thirdly, the modern realities which tend to provide the basis for the perennial popularity of certain legal theories seem to be centred on the kind of attitude each legal theory and their proponents have towards the subject of the relation between law and morality. In recent jurisprudential debates, a consideration of the future of legal positivism is rife. At the World Congress of the international Association for legal and political philosophy held in Sweden in 2003, one of the major and classical issues addressed was a critical discussion on the future of legal positivism as a distinctive legal theory.

To our mind, what necessitated the discussion concerns, most appropriately, the idea of justice and the law which legal positivism tends to deny or accept. Moreover, though the decline of natural law theory is said to be prophetic, it must be said that the idea of global democratisation and the emergence of a global jurisprudence based on a universal law and universal human rights tends to be a stimulant for the revival of legal naturalism. What provides the intellectual platform for the continual popularity and significance of these theories in modern times is the different irreconcilable attitude each theory develops towards the relation between law and morality.

Lastly, the relation between law and morality and the significance it attracts in jurisprudential discussion invite for crucial and critical scrutiny the jurisprudence of some developing countries. In very apt terms, what jurisprudence has done in recent times is to bring to the fore the salience and relevance of the debates and arguments of classical thinkers on the nature of law and its relation today to other matters such

as justice, equality, development, obligation, postcolonial jurisprudence, human rights, citizenship and increasing trends of migration. These issues and themes are of interests to Africa, the African state as it is relevant to other states in the world. This is based on the conviction that about the single element of social life that marks out the domineering power of the state and its impact on our daily lives is the state instrument of law.

But then, like Professor Hart mentioned, whether law is indeed related to morality or any other human normative convention cannot be resolved by mere surmise, but by an intellectual appraisal of what is meant by the term 'law.' Essentially, legal philosophers distinguish between the questions 'what is the law?' and 'what is law?' According to Andrei Marmor, the first question is of a local concern since it depends, strictly speaking, on what is involved in the locality in which it is raised. To this end, therefore, definitions stemming from this local perception are expected to be different and altogether dependent on each specific locality. In this case, it can be argued that such definitions are contextual or context-specific. However, the second question is more in line with the theme of general interest in legal philosophy and jurisprudence at large. This is what Professor Hart describes as the "perplexities of legal theory". In the words of Hart,

> *Few questions concerning human society have been asked with such persistence and answered by serious thinkers in so many diverse, strange, and even paradoxical ways as the question 'What is law'. Even if we confine our attention to the legal theory of the last 150 years and neglect classical and mediaeval speculation about the nature of law, we shall find a situation not paralleled in any other subject systematically studied as a separate academic discipline. No vast literature is dedicated to answering the questions 'What is chemistry?' or 'What is medicine?', as it is to the question 'What is law?'*[68]

[68] Ibid., p. 1.

In the same vein, Robert P. George tags this question of general interests as attracting "a century of arguments".[69] In both, it is clear that legal philosophy is more or less concerned with the exact nature or essence of law. But why is legal philosophy interested in this sort of general question? According to Andrei Marmor, this interest stems from the uniqueness of law not only as a social institution but also in its uniqueness as a weapon of social control. In his words:

> *This general question about the nature of law presupposes that law is a unique social-political phenomenon, with more or less universal characteristics that can be discerned through philosophical analysis. General jurisprudence, as this philosophical inquiry about the nature of law is called, is meant to be universal. It assumes that law possesses certain features, and it possesses them by its very nature, or essence, as law, whenever and wherever it happens to exist.*[70]

However, even if there are such universal characteristics of law, the reasons for a philosophical interest in elucidating them remain to be explained. First, there is the sheer intellectual interest in understanding such a complex social phenomenon which is, after all, one of the most intricate aspects of human culture. Law, however, is also a normative social practice: it purports to guide human behaviour, giving rise to reasons for action. An attempt to explain this normative, reason-giving aspect of law is one of the main challenges of general jurisprudence.

These two sources of interest in the nature of law are closely linked. Law is not the only normative domain in our culture; morality, religion, social conventions, etiquette, and so on, also guide human conduct in many ways which are similar to law. Therefore, part of what is involved in the understanding of the nature of law consists in an explanation of how law differs from these similar normative domains, how it interacts with them, and whether its intelligibility depends on such other normative orders, like morality or social conventions.

---

[69] Robert P. George, "What is Law? A Century of Arguments" in *First Things Journal of Religion and Public Life*, First Things. Com, 2001.

Arising from this, the connection between law and other normative conventions of society such as morality has been of endless attraction to the entire field of legal philosophy. According to Professor Hart, the connection between law and morality is one of the three principal recurrent questions that seem to have kept philosophy of law on an intellectual vigil. Two main significant legal traditions - the legal positivist and legal naturalists - seem to have devoted, involuntarily, the entire gamut of discussion in legal philosophy to this perennial problem.

To the question, 'are there necessary relations between law and morality?' Robert Alexy constates that "the answer to this question has far reaching consequences. They cover nearly everything from the definition of the concept of law via the conception of the legal system to the theory of legal argumentation. It is, after all, a matter of the understanding of law and of the way legal science and juridical practice see themselves. This explains why no generally satisfactory answer has yet been found, although great pains have been taken to seek one."[71]

It is in this sense that one should understand Ronald Dworkin's assertion that the connection between law and morality has been a worrisome issue in legal philosophy. For Dworkin, this concern even though appears to be one of the liveliest debates in legal philosophy, the fundamentals of the concern have a different content at different times. This is so in as much as the concern that generates the debate is aroused when the actual law or some proposed law seems to the society to be unjust.[72]

---

[70] Andrei Marmor, "On the Nature of Law" in *Stanford Encyclopaedia of Philosophy*, (on-line) 2001
[71] Robert Alexy, "On the Necessary Relations between Law and Morality" in *Ratio Juris*, Vol. 2 No. 2 July 1989, p. 167
[72] Ronald Dworkin, *Oxford Readings in Philosophy The Philosophy of Law*, edited by Ronald Dworkin, Oxford: Oxford University Press, 1977, p. 9

The remainder of this chapter is devoted to a critical analysis of the different ways and perspectives in which the relation between law and morality has been and can be viewed. Precisely, four perspectives present themselves for critical scrutiny and appraisal. The essence of this presentation is the provision of the critical basis from which subsequent analyses of the relation between law and morality in the light of the different traditions in jurisprudence can be established and critically assessed.

Moreover, these perspectives portray the view that the entire history of debates in jurisprudence and related disciplines in philosophical thoughts have been one of consistent, perpetual and undecided struggle between some ideological viewpoints, basic values of life, that are found either inherent in or approximating the concept of law. In this light, they cannot be divorced from some philosophical generalizations and speculations about life and human society and the universe in general.

1.5 THE RELATION BETWEEN LAW AND MORALITY: FIVE THEORETICAL PERSPECTIVES

It is often granted that in every mature society, there is considerable overlap between legal questions and those of morality. Sometimes, it is argued that the nature of the overlapping consists in the fact that law and morals share a common vocabulary such as 'obligation', 'ought', 'right', 'duty', 'permissible', 'forbidden', 'legitimate', 'just', 'unjust' etc.[73] From the approach of linguistic resemblance, what the law forbids, in almost all instances, are also disdained by instructions, teachings and injunctions of morality. The basis for this correlation between 'what is ethical' and 'what is legal' has been anchored, most presumably, on the fact that both law and morality do their work with the very same item of human behaviour.

[73] J. C. Smith, *op. cit.* p. 131.

Thus, it is no wonder that, more often than not, legal problems have been found to raise moral issues especially when certain legal rule or prescription violates the dictates of conscience. Such cases of direct opposition and interaction between legal rules and moral criteria have been pertinent issues in legal philosophical debates. Frequently asked, then, is the question: what is the precise character, on a specific form, that the relation between law and morality expresses?

In the literature, many intellectual responses have been developed and devoted to an apt analysis of the exact and precise relation that both concepts bear. Significantly, it is believed that what divides one school from the other is an underlying ideological pretension that often times may be wrapped up in our linguistic constructs, the use of words and the general application of concepts derived from such linguistic constructs. In the primary sense, it is often pointed out that, going by the structure of language, the language of morality and that of law represent two different fulcrums though both specifically eliciting an aspect of human behaviour.

For example, Nowell-Smith argued that the language of morals involves the demand for reasons for the performance of the expected duty whereas the language of law, both in its advanced and crude forms, is silent on the search for reasons, but openly canvasses for compliance based on the authority backing it.[74] Interestingly, it is argued that the authority behind law is that of command or force, rather than rational authority. One possible meaning of Nowell-Smith's argument consists in the view that the basis of legal obligation is not external to that law itself, in which case, from this point of view, there seems to be a distinction between law and morals. It can be pointed out, however, that even in some judicial cases, appeals to clear logic, rationality and reasons are supplied that sometimes bear on morality.

[74] Nowell-Smith, 1954: 190-98.

Again, in the important sense, the distinction between both concepts has been premised more on the fact that in most cases, there are many legal concepts, rules or questions which are morally indifferent in the sense that they do not appeal to moral or ethical considerations either in their overall nature or significantly, in what they enjoin.[75] In fact, this argument runs side by side with the ageless philosophical prescriptions and postulations of Immanuel Kant who contended that law and morality are to be held as distinguishable because laws prescribe external conduct while morals prescribe internal conduct.

The inability on the part of the law to distinguish, again, between what is strictly subjective and that which is objective for the purpose of law has led many jurists to affirm the point of distinction to consist in the fact that one is punishable in form of open external physical sanctions while the other is not, at least in this open physical sense. But then, the issue of sanctions is still open to different interpretations and meanings. What then determines the proper context of sanctions - the pains, the injury, rejection, regularity or what? The outcome, at times, depends on human attitude which is itself subject to a host of bewildering interpretations.

For J. C. Smith, discussions of the relationship between law and morality generally arise in the context of three basic questions: (1) the legitimacy of using the legal order to enforce moral judgments; (2) the moral evaluation of particular laws and the consequences or appropriate reactions when the measure is a negative one; (3) the nature of the relationship between law and morality as normative systems, and whether or not it is necessary or contingent. Furthermore, Smith constates that these questions reflect three different levels of interaction between law and morality: (1)

[75] Freeman, 1996, p. 57

the legal order and particular moral judgments; (2) the moral order and particular legal norms; (3) law and morality as systems of public order.[76]

The answers and responses to these varying questions on the nature of the relation between law and morality have been brought together in an analytical framework of four perspectives of discussion by Louis Bloom-Cooper and Gavin Drewry.[77] What must be acknowledged in this four-perspective analytical framework is the fact that the connections between law and morality are legion. As a matter of fact, what connects law and morality appear to be more fundamental than what divides or disconnects them.

In this chapter, we propose to construct another kind of perspective, which though complementary to, could be seen to be distinct from, existing ones, from which the relation between law and morality, theoretically, can also be viewed. This perspective shall be categorised as 'the cultural perspective'. The cultural perspective is concerned with the nature of the relation between law and morality from a purely cultural point of view.

It is being suggested here that the cultural perspective has been neglected in the various analysis of the connection between law and morality in jurisprudential analysis. In a way, since it takes from the acceptable view that philosophy itself is a cultural inquiry into the fundamental questions of human existence, then, it is not as if the statement of the proposed cultural perspective is particularly original. This perspective is consequential on the development of what may be termed cultural jurisprudence in the understanding of some jurisprudential problems. This cultural perspective will serve as the basis of the discussion of the relation between law and

[76] Ibid., p. 131.
[77] Gavin Drewry and Louis Bloom-Cooper, London: Duckworth Publishers, 1976:1-35.

morality in an African context, which will be the focus of chapter four below. The outlines of these perspectives are articulated below.

1.5.1 THE HISTORICAL/CAUSAL PERSPECTIVE

This perspective raises the following questions: has the law, in its contents and features, been influenced by moral principles; conversely, has the law influenced moral principles? In the history of philosophical ideas, the concepts of law and morality have not only been found side by side in human society influencing human behaviour and the development of human societies, it is asserted that a reasonable measure of their coincidence is essential and significant for progress and survival of human society. This assumption is taken as a matter of social and historical fact. In fact, this historical or causal nexus has come to be integrated into the prevailing culture of particular societies.

Historically, therefore, one of the philosophical presuppositions on which existing cultures and societies have derived their survival is the critical, integrative examinations, and ultimately, the acceptance of the intersection of the concepts of law and morality. The historical and sociological schools of jurisprudence have, pre-eminently, been occupied with this perspective. Before the advent of these schools of thought, however, western jurisprudence can be said to owe a lot to the cream of Jewish jurisprudence.

Jewish jurisprudence, as it obtains in the history of most primitive societies, manifests a kind of conflation of legal rules with rules of religion, social morality and convention. The monotheistic flavour in Jewish jurisprudence sets it apart from the jurisprudence of some of the ancient civilisations such as Egyptian, Babylonian, Greek

and Indian civilisation. According to Carl Friedrich, "the one God reveals himself very differently from the Greek gods...by his preoccupation with law."[78]

Thus, Yahweh, the God of Israel is presented as the legislator while the 'chosen' people are the subjects. If we understand Friedrich's remark that it is important that the obligation to obey the law be grounded in a conviction concerning the legitimacy of the authority which creates it, then it follows that the basis of that obligation in Jewish jurisprudence is the one God. Expectedly, the basis of obligation in Jewish jurisprudence is not faith in the community of the polis as demonstrated in Roman and Greek jurisprudence, but in the one God.

What is of interests in this modern time in relation to Jewish jurisprudence is how this understanding of the obligation to obey the law squares up with the prevalence of the positivistic and scientific inclination towards the interpretation and understanding of legal reality. Equally important is the point at which there is a divergence in the present configuration of the legal tradition of the west which is in tune with a scientific understanding of law while its roots still beckons on the world for recognition.

Given this kind of flavour, it is to be expected that the interaction between law and religion, and by implication, morality was bound to be intricately close. According to Friedrich, "law and punishment are rooted conceptually in the notion of justice. And, therefore, the God of ancient Judaism is predominantly a god of justice."[79] According to Frederick Watkins,[80] western legal thought emanated and borrowed copiously from religious principles enshrined in Judaism. What is worrisome is the fact that, in western legal tradition, there is a rejection of some of the religious

[78] Friedrich, C.J. *The Philosophy of Law in Historical Perspective*, Chicago: University of Chicago Press, 1963, p. 8
[79] Friedrich, C. p. 11.

principles it inherited and borrowed from Judaism. To mark a clear departure from that source, principles of right and justice, ideals that are entrenched and of fundamental importance to Western jurisprudence even today, are given a more positivistic and empirical interpretation and meaning.

Ancient Greek philosophy, and by extension, jurisprudence presents for the modern mind a very curious consideration in the understanding of the historical relation between law and morality. For the Greeks, especially as championed by the Sophists, law itself is an encroachment on the moral rights of the ordinary citizen. It took the exegesis of Platonism and Aristotelianism to rescue law from the museum of jurisprudential curiosities that Sophistic hermeneutics had confined it. For Plato and Aristotle, law and morality are essential virtues for the building of the Greek city-state i.e. the *polis*. According to Plato, a good order of the *polis* could be secured only by the making of a basic law or *nomos*. But thus *nomos* is to be seen by Plato as a participation in the idea of justice, and by extension, participation in the idea of the good. Thus, Platonic jurisprudence is basically one that is related to the ethical ideal.

On his part, Aristotle claims that law can be determined only in relation to the just.[81] The concept of justice was therefore paramount in the legal thought of Aristotle. Justice, for him, can only exist between men whose relations are regulated by law.[82] Such laws are to serve as habituating factors which draw every citizen to the idea of goodness. Thus, laws, for Aristotle, play an instrumental role in the polis i.e. they drive men towards the performance of the ethically good actions.

Aristotelian legal universe is thus one which endorses a close connection between law, understood as the rule of law, and ethical virtue understood as

---

[80]Frederick M. Watkins, *The Political Tradition of the West, A Study in the Development of Modern Liberalism*, Cambridge, Massachusetts: Harvard University Press, 1948.
[81] See Friedrich, op. cit., p. 21.

goodness. Such ethical virtue are inherent, Aristotle reasons, in natural just law which is founded within the framework of the constitution which is by nature best.[83] Aristotle concludes that "law is reason unaffected by desire. Surely the ruler cannot dispense with the general principle which exists in law for the rule of law is preferable to that of any individual."

The thesis concerning the essential nature of law as set forth by Plato and Aristotle, and as representing the heart of Greek jurisprudence, was inherited by Roman legal scholars and incorporated to form the heartbeat of Roman jurisprudence. The trust of Roman jurisprudence was a kind of romantic attachment to what scholars now call natural law, although this brand of legal naturalism completely deflects from that of Lon Fuller and John Finnis as we know today. One significant difference, according to D' Entreves, is that a necessary component of naturalism today is the doctrine of natural rights while Rome's romance with naturalism was emptied of natural rights concepts.

Thus, when we talk of the historical cum causal perspective on the relation between law and morality, what is at stake in the different emphasis of both the sociological and historical schools of jurisprudence is not just the consideration of the history of law and morality in these past civilisations, but also in the actual understanding of the dynamism that is hidden in the nature of this historical interaction. One major lesson of this historical interaction, according to Sociological jurisprudence,[84] is that legal reality is a social construction.[85] If understood in the light

---

[82] See Aristotle's *Nicomachean Ethics*, Trans. by Terence Irwin, Indianapolis, Indiana: Hackett Publishing Co., 1985, v. 6, 1134a.
[83] *Nicomachean Ethics*, 1135a.
[84] One of the theses of Sociological School of jurisprudence is that of the non-uniqueness of law: a vision of law as one of the methods for enhancing social control. Other theses include the rejection of the jurisprudence of concepts i.e. the view that law is a closed logical order, an admiration towards relativism and a rejection of the view that there are absolute values: values are socially, not universally, constructed. Roscoe Pound, *Interpretations of Legal History*, 1923.

of the major themes of historical jurisprudence, such social construction consists in taking law, as argued by Savigny, as linked to the biological and cultural heritage of a people. Law encapsulates a kind of unique, ultimate and mystical reality embedded in the *Volksgeist*, i.e. a people's national spirit.

Legal philosophy has not been too sympathetic to the historical/causal perspective when it comes to a consideration of the relation between law and mortality. While an explanation can be found in the fact that legal philosophers are not too at home with the task of the historical school of jurisprudence, the object of concern in this perspective itself seems to be ensconced in a kind of problematic. For one thing, if it is true, according to Brian Bix, that the history of ideas is often written in terms of schools of thought that come in and out of fashion, that prevail in struggles over particular issues, or are defeated,[86] and it is equally true that historical jurisprudence is hardly discussed in modern legal philosophy, then it follows that the death of the subject consists in the demise of the historical school of jurisprudence. What occasions the demise of discussions on the historical school of jurisprudence is a different matter entirely. But, what is important to see is that the nature of the subject matter itself is internally problematic. This is aptly put by Joseph Raz when he posited that "because legal theory attempts to capture the essential features of law, as encapsulated in the self understanding of a culture, it has a built-in obsolescence, since the self-understanding of cultures is forever changing."[87]

[85] Berger and Luckmann, *The Social Construction of Reality: A Treatise on the Sociology of Knowledge*, Garden City, New York: Anchor Books,1966.
[86] Brian Bix, "Legal Positivism" in *The Blackwell Guide to the Philosophy of Law and Legal Theory*, Malden, Massachusetts: Blackwell Publishing Limited, 2005, p. 29.
[87] Joseph Raz, "On the Nature of Law" in *Archiv fur Rechtsund Sozialphilosophie*, 82, (1996), p. 6.

1.5.2 THE VALIDITY/OBLIGATION PERSPECTIVE

Following the tenor of the second perspective, this perspective raises fundamental questions at the heart of every legal system. For example, it asks: can a rule of law, properly derived (in terms of passing through valid constitutional process) he held to conflict with some moral principle, thus leaving obedience, or obligation, in doubt? The lead question of this perspective which is akin to that of Saint Augustine is: can an unjust law be law? This comes down to the following questions- to what extent does morality determine, or influence, obligation to the law?

On this count, Natural law thinkers have developed the opinion that morality is in some very fundamental way an integral part of law or of legal development, in that morality is "secreted in the interstices" of the legal system and to that extent is inseparable from it. Put in proper context, the argument runs that the legal validity of a norm is determined by the contents of the law in question.

Though positivists do not reject the idea altogether, it must be emphasised that what they maintain, in the strictest sense, is the view that once a rule is laid down or determined, it does not cease to be law just because it is shown to conflict with a moral law.[88] Again, Hart has provided the modern rendition of the positivists' thesis: according to Hart, "it could not follow from the mere fact that a rule violated standard of morality that it was not a rule of law, and conversely, it could not follow from the mere fact that a rule was morally desirable that it was a rule of law."[89]

The history of this debate is an important one. Essentially, it borders on what the grounds for the obligation to obey the law is, whether legal or moral, and what the implication of each position is for the nature of the relationship between law and

[88] M. D. A. Freeman, op. cit., p. 59.
[89] Hart, H. L. A. "Positivism and the Separation of Law and Morals" Harvard Law Review, vol. 71, No. 4, Feb. 1958, p. 599.

morality. Since the history of the debate is a controversial one, and a very important too, we shall attempt to state and clarify, briefly, the issues involved.

At the level of perception, an enlightened understanding of the idea of the obligation to obey the law, in our opinion, establishes the importance of the question: is there an obligation to obey the law? This question, for a proper treatment of the subject-matter, presupposes a consideration of the idea of obligation itself. The question then is what are obligations? The concept of obligation is often used synonymously or interchangeably with the idea of duties. Both concepts are further seen to have the same structure with 'ought' statements. In ought statements, there is an expression of judgement and evaluations. Some actions are weighed, evaluated and judged according to certain specified standards, and on those bases evaluated either as wrong or right.

A statement emphasising or embodying such judgements or evaluations that someone 'ought to do x,' or that someone has the obligation or the duty to do x, or their opposites in general, is in part a declaration that there are good reasons for the doing of the act or some consequences for failing to do them. That is why, in most 'ought', or 'obligation', statements that express such judgements and evaluations, the expression 'why?' in most cases, is found to accompany them[90]. But then, the question is: 'what is obligation?' What are duties? What are the structures of `ought' and obligation statements?

According to A. John Simmons, obligations are moral requirements generated by the performance of a voluntary act.[91] According to the same author, duties are either

[90] *J.C. Smith Legal Obligation (London: Athlone Press, University of London, 1976) p.35*

[91] *A. John Simmons in Moral Principles and Political Obligation (Princeton: Princeton University Press, 1979), p. 11*

positional or moral.[92] The former refers to those duties owed by virtue of holding a particular position or office, moral duties are those owed by virtue of our membership of the human race. Hence, the former talks of a public officer such as a judge, policeman and such other public officers with specified and spelt-out functions or duties to carry out. The latter refers, for example, to our natural duty as humans to aid fellow humans who are in need. To this end, positional duties, according to Simmons, are morally binding only when the office is voluntarily undertaken.

In the light of this analysis, talk of obligation can be better comprehended also, by an intellectual discourse on the nature of duties and the various distinctions that can be made on the concept of duties. This is because duties are species of obligation in as much as it can be established that both are normative words i.e. expressive of judgement and evaluations. To this end, there is a distinction between prima-facie duties and actual duties. Prima facie duties are duties that have presumption in favour of obedience. To argue against those presumptions underlying the basis of such duties is to advance reasons to show that some one does not have such duties. And, in case those reasons are not strong enough or there are no reasons given to back such claim to lack of such duties, such duties become what one ought to do.[93] In this case, those duties become actual duties which are, by their nature, self explanatory e.g. the duty of a father to his son or of a mother to her child.

Moreover, there are moral duties and legal duties. The former refers to duties that have prevailing morality explaining their origin. The pressure which backs up claim

[92] *Ibid. p. 12*

[93] *Tony Honore," Must we Obey? Necessity as a Ground of Obligation" in Virginia Law Review vol. 67 Feb (1981) p. 48*

to conformity then becomes solely respect for law.[94] The respect henceforth becomes duties couched in legal directive or promulgation hence, legal duties. But the interesting question is at what point does this exchange occur between moral and legal duties? How do we establish whether the respect for law that takes over now is not traceable to the morality that initially gave birth to such duties, and that, in fact, those respects are really the morality inherent in those laws?[95]

It can therefore be submitted that there is always a logical relationship between the concepts of 'a reason' and 'ought statements'.[96] It is along this line of reasoning that the idea of a duty or obligation to obey the law appears as a substantive philosophical problem. We may therefore draw the conclusion that if it is the case that some one ought to do something, or something ought to be done, then it is the case that there are good reasons for that thing being done[97] or for not being done. So, the question often is: is there a prima-facie duty or obligation to obey the law? To say that there are obligations to obey the law is to invite the reason why a citizen has the duty, or obligation, to obey the law of the state. In what, then, does the obligation to obey the law consist?

Legal philosophical debate is replete with authors who contend that there is a legal obligation to obey the law and those who are sceptical of such claims. John Austin, for instance, claims that obligation to obey the law is legal. According to Austin, the

---

[94] *See Dias, Jurisprudence, chp. on "Obligation and Duty" (London: Butterworths and co publishers, Ltd, 1985) fifth ed. p. 229*

[95] *These questions underscore one of the controversial dimensions on the debate whether there is a necessary connection between law and morality. See the exchange between Professors Hart and Fuller in Harvard Law Review vol. 71, (1958); see also Edmond Cahn, The Moral Decision (1955); Bloom Cooper and Drewry, G. Law and Morality (1976); Norman Saint John-Stevas, Life, Death and the Law, (1961).*

[96] *J.C. Smith op. cit. p. 35*

[97] *Ibid., p. 59*

source of such legal obligations consists in the binding nature of that law. In Austin's words, "a law without an obligation is a contradiction in terms."[98] What a law forbids or enjoins is binding and to that extent obligatory. Thus, for Austin, obligation to obey the law stems from the law itself, i.e. the basis of obligation is internal to that law. For Austin, the salient feature of this obligation consists in the pain that can be inflicted on an individual in case of failure to obey.

Austin's critics see in his work a fundamental error. According to Hart, Austin's theory is entirely defective to reflect a fine picture or account of obligation. In the first instance, Austin's theory of obligation is accounted for from a lopsided view on the nature of law, a model which cuts off right-conferring laws which are, practically, not indicative of commands. In the second instance, sanctions don't explain the ought of law, since it exaggerates the relation between having an obligation to obey the law and being obliged to obey.[99] According to H.L.A. Hart, theory of obligation is explainable in words such as "ought," "obligation," "being bound," "having a duty", because of their connection to the internal aspects of the rules of law. In his words, "if we have an obligation to do something there is some sense in which we are bound to do it, and where we are bound there is some sense in which we are, or, may be compelled to do it."[100]

For Hart, legal obligation consists in, one, the existence of social rules, making certain types of behaviour a standard; two, the application of such rules to a particular person by calling his attention to the fact that his case falls under it[101]. However, a rule,

---

[98] *p. 96*

[99] *Hart, H.L.A. "Obligation and Coercion" in The Nature of Law by M.P. Golding (ed.) (1966), pp. 104-106*

[100] *Ibid p. 104*

[101] *Hart, H.L.A. The Concept of Law (Oxford: Clarendon Press, 1961) p. 83*

say x, imposes obligation if and only if it has the following characteristics. One, if x establishes that there is social insistence for conformity; two, that x is necessary to the maintenance of social life; three, that x involves renunciation and sacrifice.[102]

Hart's obligation theory is, nevertheless, insufficient since it only explains how people view rules when they accept them as standards. He has not explained why they accept certain rules as guides for conduct[103]. What needs to be explained is the "why" not the "how". According to R.J. Bernstein, Hart's explanation was insufficient to demonstrate the difference between rules that create or impose obligations and those that do not. He gave an example of standards which do not create obligation but nevertheless, attract severe social pressure on those who deviate[104].

On his part, Prof Henry Hart remarked that obligation to obey the law is legal. In his words, "Knowing or reckless disregard of legal obligation affords an independent basis of blame worthiness justifying the actors condemnation as a criminal."[105] For Tony Honore, citizens have a legal obligation if each member in a society in which membership is compulsory has a duty to comply with the requirements of the other members when these requirements are brought to his attention in proper constitutional form.[106]

The fact remains, however, that a law that enjoins or forbids a particular action, is a statement of fact. If we describe the "ought" of our obligation in terms of the existence of laws, how then do we distinguish between the "ought" that are legal and

---

[102] *Ibid, pp. 84-85.*

[103] *J.C. Smith, op. cit. p. 28.*

[104] *Bernstein, R.J. "Prof Hart on Rules of Obligations", Mind vol. 73 (1964), p. 563. An example Prof. Bernstein gave is nakedness.*

[105] *Henry Hart, "The Aims of the Criminal Law" in Law and Contemporary Problems vol. 23 (1958) p. 401, 418.*

[106] *op. cit. p. 44*

"ought" that are strictly moral? Or, are legal obligations in the same sense as moral obligations? What would then differentiate obligations that are moral from those that are legal? These are questions relevant to a critical scrutiny of the view that there are obligations to obey the law and that they are legal i.e. derived from legal directives.

Sceptics on the idea of legal obligation, on the other hand, could justifiably ask whether the fact that a law requires something in and of itself, is a necessary and sufficient condition for doing it? Joseph Raz, for instance, asserted that there is no obligation to obey the law.[107] Woozley opined strongly that to explain that the reason why a law is obeyed is because it is the law is no reason at all. According to Woozley "If political leaders and police chiefs had their way all of us would believe that a powerful reason (possibly the principal, if not the only, reason) that we should obey a law is that it is a law. In fact, with the exception of a special class of laws, it is no reason at all"[108]. That a law enjoins or forbids the performance of an act may not constitute in itself a sufficient reason for our obedience to such laws. A law simply states that something should be done, why it should be done is outside the purview of the law.

Alan Simmon, on his part, claims that governments do not normally have the right to be obeyed by their citizens, or to force them to obey, or to punish them for disobedience[109]. In another sceptical conclusion, M.B.E. Smith asserted that there is no prima-facie obligation to obey the law.[110] This is because there are always strong reasons to show that there is no such presumption in favour of a duty of obedience to the law. There are, and can be, always, strong reasons to deny the existence of a legal

---

[107] J. Raz, *The Authority of Law, Essays in Law and Morality*, (Oxford: Clarendon Press, 1979). p. 233.

[108] A.Z. Woozley, *Law and Obedience*, (1979) p. 72

[109] Simmon, op cit pp. 193 - 195.

[110] M.B.E. Smith "Is There a Prima Facie Obligation to Obey the Law? *Yale Law Journal* vol.82 (1973) p.950

obligation. Richard Wasserstrom debunked the view that if an individual acts illegally, there cannot be strong reasons to justify his acting illegally.

All these are sceptical answers to the question of whether the barefact that something or an action is enjoined or forbidden by a law is in itself a necessary and sufficient condition for doing or refraining from doing what the law states. However, viewed from a softer perspective, there are exceptions to these sceptical conclusions. Joseph Raz, for instance, says that a person who actually respects the law of his state is bound to obey. To respect a particular system, to him, explains that certain obligations follow. Woozley, however, conceded to the fact that only a special class of laws conveys an idea of our being bound to do what the law says and that will be a sufficient reason. For example, constitutive laws on voting[111] For one to vote, and vote in the proper sense, it is incumbent on one to consider the law on voting as sufficiently strong to explain why that law is obeyed. Except where one chooses not to vote at all, and that would mean there is a weightier moral reason for refraining from voting.

All these sceptical philosophers admit, however, that there are independent moral reasons for doing what the law requires. However, the important question is: where and to what end does these viewpoints lead us in our discussion of the problem of the obligation to obey the law? Whether obligations are moral or legal depends on what goes into saying that an obligation is moral or legal.

That there are legal obligations conveys the idea that obligation to obey the law is internal to the legal process itself. "The source of legal obligation", says Smith, "is to be found in the authoritative coercive power by which the laws are enforced, rather than being derived from the content of the law."[112] The important element of such

[111] *op cit. p. 6*

[112] *Smith op. cit. p.7*

authoritative power, will, no doubt, be coercion. Such views are therefore described as 'coercive theory of obligation.' According to Smith, "coercion deals with means rather than ends, consequently legal theories having a coercive theory of obligation, will be positivistic. Coercion is related to command and a command is generally an expression of the will rather than of reason, as it does not logically invite justification in the way that an appeal to reason does."[113]

For one thing, a "why" is entailed in the understanding of the concept of obligation. Moreover, the idea of legal obligation as presented above conveys the belief that an obligation does not exist or is not created for an individual where there is no possibility of his being caught and punished.[114] It is true according to Hart that if a man is said to have or lie under an obligation, there is some sense in which one is bound to do what one has obligation to do. But it does not follow that he has to be compelled to do it. Obligation is not derived out of compulsion. It sounds very odd to speak of obligation that one is compelled to do. Hart, along this line, often speaks of an imposed obligation. Obligations, however, are not imposed because that picture conveys an idea of a forced obligation. Obligation is not imposed; rather, they are created, assumed, owed or accepted.

Moral obligation, on the other hand, views our obedience to any law as something external to that law. In other words, that what adequately explains that a law is morally binding on an individual is that it achieves the desired end of human existence, for instance, happiness, in the light of which that law can be said to be justified. An immoral law, for example, one that fails to achieve the desired end of human existence, creates or carries no obligation. The argument is not that every moral

[113] Ibid

[114] Theodore Benditt, *Law as Rule and Principle* (England: The Harvester press Ltd., 1978) p. 118

rule automatically becomes a legal rule but that whatever legal rule is made to be binding, morally, ought to admit of the minimum standard of a moral rule. In other words, that the "ought" of a legal rule is furnished by a moral "ought" in that if it is the case that a person is having an obligation to do x, then it is the case that he ought to do it in a moral sense.[115]

This is suggestive of Natural law thinking. Saint Augustine's famous thesis "an unjust law is no law at all" conveys the import of the view above. The same is hinted by Lon Fuller when he argues that there is a morality that makes law possible, hence binding or obligatory. This he called the "Inner or Internal morality of law," and "The external morality of law."[116] The latter explains the morality that makes law possible i.e. some required moral foundations necessary for the existence of a legal order or system. Fuller described the former as those moral principles to which every attempt at law-making must conform or fail. These moralities, according to Lon Fuller, serve as the basis, of our obligation to obey the law. To him the obligation cannot be legal because law is not and cannot be built on law alone. In his word,

> *There is a two-fold sense in which it is true that law cannot be built on law. First of all, the authority to make law must be supported by moral attitudes that accord to it the competency it claims. Here we are dealing with a morality external to law, which makes law possible. We still cannot have law until our monarch is ready to accept the internal morality of law itself.*[117]

The same views are to be found in the work of John Finnis. Finnis, following the Natural law tradition, claims that the obligation to obey the law has to do with the extent to which the law in question either contravenes or enforces the idea of what he calls "basic values" and "practical reasonableness". Laws that contravene them are termed unjust because they are the ideas that help achieve the common good. Those

---

[115] *J.C. Smith op cit. p. 6.*

[116] *Lon Fuller, The Morality of Law (Connecticut: Yale University Press, 1964), pp. 152-184. See also "Positivism and Fidelity to Law - A Reply to Prof Hart" in Harvard Law Review, vol. 71 (1958), pp. 630-72*

[117] *See " Fuller's Positivism and Fidelity to Law," Harvard Law Review vol. 71 (1958) p.645.*

that enforce or approximate them are just. Hence, "the moral authority of the law depends ... on its justice or at least its ability to secure justice"[118]. Such sense of justice, according to Finnis, is not self-directed but others-directed i.e. it has to do with relations to others[119]. It is a duty owed to another such as a ruler's duty to his subjects i.e. a duty to ensure the administration of just laws. That such a duty is others-directed helps establish, further, that obligation to obey the law is not prudential. According to Finnis, our obligation to obey the law, prima facie, is a moral obligation once it can be validly established that those laws are just i.e directed toward achieving the common good. The import of this viewpoint is conveyed in the following:

> *The ruler has, very strictly speaking, no right to be obeyed; but he has the authority to give directions and make laws that are morally obligatory and that he has the responsibility of enforcing. He has this authority for the sake of the common good... Therefore, if he uses his authority to make stipulations against the common good or against any of the basic principles of practical reasonableness, those stipulations altogether lack the authority they would other wise have by virtue of being his*[120].

Summarily, moral obligation states that obligation to obey the law is derivative i.e. the conformity of the legal norm with some external norm. In other words, it means the moral content of the law defines or decides whether one falls under the obligation to obey the law or not. The implication of the foregoing, with very serious consequences, is the view that there is then a necessary connection between law and morals.

The affirmation that there is such a necessary connection by legal naturalists and the denial of such a connection by legal positivists, as evinced in the tenor of the debate highlighted above, constitute one of the deeper controversies in legal philosophy today. What is needed to understand the heart of the problem is a careful reflection and

---

[118] *John Finnis, Natural Law and Natural Rights, (Oxford: Clarendon Press, 1980) p. 260*

[119] *Ibid p. 161*

[120] *p. 359-360.*

analysis on what is meant by a necessary, conceptual or logical connection between two or more concepts such as law and morality. This is the focus of the fourth perspective.

1.5.3 THE ENFORCEABILITY/CRIMINALISATION PERSPECTIVE

This perspective interrogates the relationship between law and morality from a very fundamental basis that is of impeccable consequence for human beings' social and political life. In a direct sense, it underscores the meaning of public and private morality from the view point of the law. Essentially, therefore, it inquires into the debate on how and why legal means should be employed in enforcing morality. This can be put in several ways: is it the business of the law to secure compliance with a society's moral standards? Is the fact that certain conduct is considered immoral a sufficient reason to make it a punishable offence? Is it the proper function of the law to compel citizens to behave in what the society considers to be a morally acceptable way? Should the law enforce morality?[121]

The significance of this perspective on the relation between law and morality has been put and argued in several ways. As argued by Riddall, there are many issues about law and morality which the debate here is not about.[122] But if it has any meaning at all, for Riddall, the meaning of the debate could be said to be whether the law can stand aloof or aside and watch while a citizen under its care can go any length all in the name of rights, liberty and private morality to damage and injure himself.[123] This claim has therefore been interpreted in many ways.

The discussions can be classified into the traditional and the modern. The traditional dimension of this debate is aptly represented in the views of John Stewart

---

[121] J.G. Riddall, *Jurisprudence*, London: Butterworths, 1991, p. 291.
[122] J. G. Riddall provides a list of nine meanings which the debate is not about. For him, the debate essentially is not about arguing that there is no connection between law and morality since it is impossible to hold a thesis. Such interactions and connections, in his words, are legion. For a comprehensive treatment of that analysis check: J.G. Riddall, *Jurisprudence*, London: Butterworths, 1991, p. 292-296.
[123] Ibid., p. 293.

Mill and Sir James Fitzjames Stephen. The modern dimension of the debate consists in the intellectual exchange between Sir Patrick Devlin and Professor H. L. A. Hart with several reactions trailing their respective treatments of the issue.

The traditional approach to the debate was set by the thought-provoking views of John Stuart Mill on the nature of the limit of state power over individual rights. According to J. S. Mill, "to individuality should belong the part of life in which it is chiefly the individual that is interested; to society, the part which chiefly interests society."[124] Sometimes, what interests an individual chiefly may be found to either coincide or collude with what interests others or the society at large. The question then is: what is the dividing line between what chiefly interests society what chiefly interests an individual?

For J. S. Mill, society's interest in the interests of an individual is only a small fraction of the whole sum of interests available to the individual. In his words, the individual "is the person most interested in his own well-being: the interest which any other person except in cases of strong personal attachment, can have in it, is trifling, compared with that which he himself has; the interests which society has in him individually (except as to his conduct to others) is fractional and altogether indirect..."[125]

It is somewhat clear that Mill's opinions are directed at debunking the prevailing opinion that one of the legitimate functions of the law is to raise and protect the moral fibre of a nation. The sum of Mill's argument consists in the view that law ought only to be used to regulate conduct which interferes with others. It is not sufficient grounds for the law to be used to enforce the personal good or moral welfare of an individual. Mill's insistence on the limit of state power is very crucial in

[124] J. S. Mill "Of Society and the Individual" in *Individual and Freedom: Mill's Liberty in Retrospect*, D. Spitz (ed.), Chapter Four, New York: W. W. Norton and Co., 1971, p. 70.

the overall understanding of the distinction between public morality and private morality.

As argued by K. R. Monogue, what lies at the heart of the distinction is the reality of the concept of the individual for liberals and liberal ideology. In his words, "the unity which allows us to discuss liberalism over the last few centuries as a single and continuing entity is intellectual; we are confronted with a single tradition of thought, whose method is intermittently empirical, whose reality is found in the concept of the individual, and whose ethics are consistently utilitarian."[126]

While the virtues of utilitarianism have been a major theme of celebration in social philosophy, the addition of J. S. Mill as conceived here is problematic. The difficulty arises when an attempt is made to reconcile the reality and virtues of individualism with the utilitarian emphasis on the promotion of the greatest number of pleasures over pain. Furthermore, the possibility of posing a false dichotomy between private morality and public morality is inherent in Mill's advocacy on individualism since the distinction does not admit of any clear-cut application in actual life.[127] Mill's strong argument in favour of individualism, it is argued, is a plea for social irresponsibility.[128]

Mill's thesis has been criticised in a rejoinder by Sir James Fitzjames Stephen.[129] According to Sir Stephen, some acts are so outrageous that they need to be prevented at all cost. This prevention, for Stephen, consists in using the weapon of the law. The question is: on what basis? The basis, for Stephen, is that the prevention of such outrageous acts constitutes an end in itself, regardless of whether such acts harm no one directly or indirectly. In this regard, it is clear that Mill and Stephen have a

---

[125] Ibid., p. 71.
[126] Minogue, W. R. *The Liberal Mind,* London, 1963, p. 14.
[127] Spitz, D. op. cit., p. 215.
[128] Ibid., p. 219.

point to settle: while Mill was willing to make a distinction between what is private and public, Stephen was not only silent, but collapses the obvious point of distinction between what is private and what is public.

Stephen's argument, it appears, is a deliberate neglect of the distinction between the private and the public. Even in theoretic terms, it is possible to contend that what is private enters or encroaches on the public and vice versa. That does not, however, constitute enough reasons to deny the essential distinctions between those two realms of human life.

Empirically, there is a distinction between what is private and what is public. According to B. Mitchell,[130] law performs many functions which include its non-neutrality to moral issues. For him, there are universal values of morality which the law assumes. What is not true of Stephen's argument, for Mitchell, is the view that law conflates or should conflate the essential distinctions between the private realm and the public realm. As far as it is possible, law should and does respect the privacy of individuals.

A modern approach and dimension to the debate on criminalisation of morality is contained in the famous exchange between Lord Patrick Devlin and Professor H. L. A Hart. While Devlin's critique of the individualism and liberalism of J. S. Mill in relation to the question of legalisation of public and private morality was in principle, Hart's rejoinder and attack of Stephen and Devlin's paper was a defence of liberalism.

In essential terms, Devlin's attacks were directed at the general conclusion contained in the report of the Wolfenden Committee on Homosexual Offences and Prostitution.[131] The submission of the committee was to the effect that the law should

---

[129] Stephen, J. F. *Liberty, Equality and Fraternity*, 2nd edition, London, 1874, p. 200.
[130] B. Mitchell, *Law, Morality and Religion*, 1967
[131] *Report of the Committee on Homosexual Offences and Prostitution*, London, 1957, Her Majesty's Stationery Office, cmnd. 247.

not regulate sexual conducts in private by consenting adults. In the words of the committee, "unless a deliberate attempt is to be made by society, acting through the agency of the law, to equate the sphere of crime with that of sin, there must remain a realm of private morality which is, in brief and crude terms, not the laws business. To say this is not to condone or encourage private immorality."[132]

The committee further enthused that "it is not the duty of the law to concern itself with immorality as such...it should confine itself to those activities which offend against public order and decency or expose the ordinary citizen to what is offensive or injurious."[133]The committee's decision and conclusion is that a criminal offence cannot be levied against immoral acts such as homosexuality, in private, between consenting adults.

Devlin attacked the report in principle and hence, the liberal doctrine on the grounds that acts of immorality whether private or not, are against one of the principle upon which society is based, for example, the sanctity of human life.[134] Devlin proposed three interrogations and from these deduced his arguments on the claim that morality should be criminalised. One, has society the right to pass judgment at all on morals? Ought there, in order words, to be a public morality, or are morals always a matter for private judgment? Two, if society has the right to pass judgment, has it also the right to use the weapon of the law to enforce it? Three, if so, ought it to use that weapon in all cases or only in some; and if only in some, on what principles should it distinguish?[135]

In answering these questions, Devlin came to the obvious conclusion that the "society has the right to make judgment and has it on the basis that a recognised

[132] Quoted in Riddall, op. cit., p. 177.
[133] Ibid.
[134] Devlin, P. "Morals and the Criminal Law," in *Philosophy of* Law, R. Dworkin (ed.), London: Oxford University Press, 1977, p. 71

morality is as necessary to society as, say, a recognised government, then society may use the law to preserve morality in the same way as it uses it to safeguard anything else that is essential to its existence."[136] In furtherance of this conclusion, Devlin claims that "any immorality is capable of affecting society injuriously and in effect to a greater or lesser extent it usually does: this is what gives the law its *locus standi*."

In a nutshell, Devlin attacked, in principle, the liberal approach as contained in Mill's thesis and as propounded in the report of the Wolfenden Committee. This boils down to the fact that the society has the right to use the criminal law in punishing any act considered immoral by the "Man in the jury box" or " the right-minded man", which of course, will be acts which are a compound of feeling of indignation, intolerance and disgust i.e. based on common sense rather than reason.[137] The question the is: what is the morality of the "right minded man?" The morality of the "right minded man" is subject to many interpretations. For G. Hughes, the morality of Devlin's right-minded man evidently does not mean commonly shared attitudes of approval and disapproval but the morality of a Church group.[138]

Hart's contribution to the debate was not only an attempt to defend the liberal ideology, but also an attempt to establish the nature of relationship between law and morality in the light of their role in societal integration. For Hart, morality is essential to the integration and survival of the society, but "it does not follow that everything to which the moral vetoes of accepted morality attach is of equal importance to society; nor is there the slightest reason for thinking of morality as a seamless web:

---

[135] Ibid., p. 72.
[136] Ibid., p.
[137] Ibid., p.
[138] Hughes, G. *Yale Law Journal*, 1962, 71, p. 680.

one which will fall to pieces carrying society with it, unless all its emphatic vetoes are enforced by law."[139]

Hart's recourse to the historical argument against Devlin is decisive: there is no historical evidence that the preservation of a society requires enforcement of its morality. Thus, adherence to any moral code is not the only coherent aspect of life which holds society and its existence, as there could be other forms. According to Hart, Devlin's attack on the liberal doctrine falls short of the importance of the distinction between shared morality and enlightened morality. For Hart, Devlin's position that morality is a compound of feeling of indignation, intolerance and disgust could as well be based on superstition and perhaps, traditions, ignorance and misinformation, so that the proper place of private morality is not put into consideration.

Apart from the conclusions and the arguments of these scholars on the criminalisation of morality, the debates over the criminalisation of morality tend to assume many dramatic and interesting forms. In one way or the other, the jurisprudence of most developing countries is littered with interesting dimensions to the subject of criminalisation of morality of one sort or the other. It behoves one to state, however, that many issues in the debate appear to be begging for intellectual clarification.

The importance of Hart's submission in the defence of the thesis of liberalism not only impresses on the relationship between law and morality, its importance lies also in his distinction between what he called 'shared morality' and 'enlightened morality'. Stephen's problem, for Hart, consist in the fact that to use coercion to maintain the moral status quo at any point in a society's history is to artificially arrest

[139] H. L. A. Hart, "Immorality and Treason", in Spitz (ed.) op. cit., p. 249.

the process which gives social institutions their value.[140] We cannot, however, push this argument too far since coercion could be seen as instrumental also in the building of a society's life. For example, in the jurisprudence of most developing states, the instrument of force has been very instrumental in the building of not just social institutions but also the state as the major institution of societal life.

Modern realities which this debate tends to reflect should not be less conscious about this essential distinction and how the difference, conceptually and practically, enters into what is considered as the canons of accepted morality. What constitutes the canons of accepted morality is very crucial and it is at this point that most defenders of the enforcement programme appear to enter into some obvious problems. Dworkin, for instance, criticised Devlin as follows: "what is wrong" with Devlin's formula "is not his idea that the community's morality counts, but his idea of what counts as the community's morality."[141]

It can also be said that Stephen's recourse to the unanimous opinion of the community is elitist. Judged from his constant emphasis on coercion, it is deducible that Stephen canons of accepted morality could be that of the ruling class. For example, if it is true that morality should not be thought as a seamless web, the morality in question here as suggested by Hart, should also be interrogated.

Above all, our own conclusion is that even if the canons of morality cannot enforce itself in matters of private life, then it is not too comforting an argument that the weapon of the law can. Except for a complete new set of laws which will apply to a religious community alone who sometimes claim and speak of a higher inner law that controls the public as well as the public. A case in point is the Sharia debacle in

[140] Hart, H. L. A. *Law, Liberty and Morality*, London, 1963.
[141] Dworkin, R. "Lord Devlin and the Enforcement of Morals" in 75 *Yale Law Journal*, (1966), p. 1001.

Nigeria but which raises an entirely new set of reasoning and problems beyond the purview of this work.

1.5.4 THE NECESSITY/CONCEPTUAL PERSPECTIVE

According to this perspective, the following questions appear pertinent: does the concept of law necessarily refer to the concept of morality? Is there a logical, conceptual connection or relation between the concept of law and the concept of morality? Is law indissolubly fused with morality at every point? The controversies over the relation between law and morality seem to start and end here.

Positivists, starting with the works of Jeremy Bentham, John Austin and recently, H.L.A. Hart, have all postulated in very firm terms that there is no necessary connection between law and morality. According to Hart, "it is in no sense a necessary truth that laws reproduce or satisfy certain demands of morality, though in fact they have often done so."[142] Their intellectual opponents, the natural law thinkers, have also posited that the conceptual and factual history of law shows a clear necessary link with morality.

Precisely, the famous debate between H.L.A. Hart[143] and Lon Fuller[144] has been hailed as a perfect expression of the meaning of necessity and contingency when it comes to the relationship between law and morals. What is crucial, therefore, in the understanding of this perspective is the meaning each of the two schools attaches to the phrase 'logical, necessary or conceptual connection.' Here, epistemology can be appealed to for the purposes of understanding and clarification of these concepts and terminologies. What then is necessary connection between two things?

---

[142] Hart, H.L.A. *The Concept of Law* Oxford: Clarendon Press, 1961, p. 181.
[143] H.L.A. Hart "Positivism and the Separation of Law and Morals", *Harvard Law Review* Vol. 71 (1958).
[144] Lon Fuller "Positivism and the Fidelity to Law - A Reply to Prof. Hart" *Harvard Law Review* Vol. 71 (1958)

In Humean epistemology, the idea of a necessary connection between two objects, events or concepts can be treated in the light of impressions and their corresponding ideas. Thus, every idea has its antecedent impression. Again, one idea or thought often leads to another idea, that is, there may, therefore, be a kind of observed regularity between one idea and another. This regularity often compels us to conclude that certain uniform principles are involved in associating them together. In other words, that there are qualities in these ideas that make them naturally introduce one another.

According to Hume, three factors are believed to account for the association of ideas. These are resemblance, contiguity and cause and effect. These principles are, however, not statements of necessary connections; they are merely empirical generalisations. Thus, "we only learn by experience the frequent conjunction of objects, without being ever able to comprehend anything like connexion between them."[145] What experience supplies to our understanding, according to Hume, is that objects follow each other in a successive way; that is, an event follows another one almost instantly. Such frequent conjunctions are notable in objects and events in that manner because those objects are constantly conjoined. In this constant conjunction, there is nothing perceived which shows that those objects or events are one and the same.

In other words, we merely happen to find that the idea B which follows idea A tends, other things being equal, either to be the idea of something which resembles that of which A is the idea, or to be an idea which has been "contiguous" with the idea of A, or to be causally related to A. Upon the whole, according to Hume, "there appears not, throughout all nature, any one instance of connexion which is

[145] David Hume, *An Enquiry Concerning Human Understanding*, Oxford: Clarendon Press, 1777, sections 7 and 5.

conceivable by us. All events seem entirely loose and separate. One event follows another; but we never can observe any tie between them. They seem conjoined, but not connected." Relation between objects and events is only that of cause and effect and never that of necessity. According to Hume,

> *"For surely, if there be any relation among objects which it imports to us to know perfectly, it is that of cause and effect. On this are founded all our reasoning concerning matter of fact and existence. By means of it alone we attain any assurance concerning objects which are removed from the present testimony of our memory and senses".*

Hence, according to Hume, there is no necessary connection between one idea and another except these kinds of relations. What leads the mind to a conclusion of necessary connection between objects, according to Hume, is borne out of the experience of a number of similar instances which occur of the constant conjunction of these events or object over time. Even with this, according to Hume, similarity in a number of instances of the occurrence of an event or even a consideration of a single instance does not warrant nor provide justification of a necessary connection between those objects or events. In a fairly long passage, Hume's conclusion shows that

> *...there is nothing in a number of instances, different from every single instance, which is supposed to be exactly similar; except only, that after a repetition of similar instances, the mind is carried by habit, upon the appearance of one event, to expect its usual attendant, and to believe that it will exist. This connection, therefore, which we feel in the mind, this customary transition of the imagination from one object to its usual attendant, is the sentiment or impression from which we form the idea of power or necessary connection. Nothing farther is in the case...When we say, therefore, that one object is connected with another, we mean only that we have acquired a connection in our thought, and give rise to this inference, by which they become proofs of each other's existence: A conclusion which is somewhat extraordinary, but which seems founded on sufficient evidence...Custom, then, is the great guide of human life. It is that principle alone which renders our experience useful to us, and makes us expect, for the future, a similar train of events with those which have appeared in the past. Without the influence of custom, we should be entirely ignorant of every matter of fact beyond what is immediately present to the memory and senses.*

The Humean conclusion on the denial of the idea of necessary connection between objects and events seems to have gained much appeal in positivists' rejection

of a necessary connection between law and morality. Even though the application of Hume's denial of necessary connection between objects and events appears doubtful, in our thinking, to the relation between law and morality, it is incumbent on our part to contend that the scepticism of David Hume on the idea of necessary connection achieved two objectives for positivists': in the first instance, it provided the basis for rejecting naturalists claim to a necessary connection between law and morality; and secondly, it provided the platform for positivists' attempt at a detailed empirical and scientific description of the nature of law.

Thus positivism in legal philosophy was empirically inclined, contending, as it were, that laws are to be treated as social facts. The basis for this rejection consists in what Hume described as the illogicality of deriving the 'is' from the 'ought'. Again, it is also doubtful whether the illogicality of deriving the 'is' from the 'ought' is grounded in the denial of the idea of necessary connection between objects and events. The push and pull of western jurisprudence has been centred on this problem and controversy. The central thesis and contention involved in this perspective, as emphasised and claimed by legal positivists, shall be the subject of critical discussion in the next chapter.

But before this, we shall attempt constructing the cultural perspective and examine whether its running thesis may be found acceptable particularly as a dynamic approach to the understanding of the connection between law and morality.

1.5.5 THE CULTURAL PERPSECTIVE

The cultural perspective to be ferreted on the relation between law and morality can be regarded as an aspect and fallout of the growing consciousness towards what scholars such as Austin Sarat, David Howes and Alison Renteln have variously tagged cultural or cross-cultural jurisprudence. Cultural or cross-cultural

jurisprudence or cultural justice system can be simply defined as one that recognizes, honours and protects the rights of cultural contribution in the creation, development, growth, and maintenance of an equitable, workable and systematic justice system in order to fulfil the mutual self-supporting destinies of such cultural groups.

The common notions and concepts in cultural jurisprudence commonly are judicialisation of culture, legalization of culture or the jurisprudence of cultures and cultural rights. The overwhelming awareness of the evidence of cultural rights makes cultural jurisprudence as part of general jurisprudence,[146] and its utility and salience, a compelling and growing jurisprudential force in recent times. As excellently captured in a recent study on the boundaries between law and culture:

> *Culturally-reflexive legal reasoning is increasingly necessary to the meaningful adjudication of disputes in today's increasingly multicultural society. It involves recognizing the interdependence of culture and law (i.e., law is not above culture but part of it). Judges ought to acknowledge and give effect to cultural difference, rather than override it. Deciding cases solely on the basis of some abstract conception of individuals as interchangeable rights-bearing units would have the effect of undermining our humanity. It is our cultural differences from each other that actually make us human. However, in extending judicial recognition to such difference, judges must be careful to take cognizance of their personal culture, and not just that of "the other." Reflexivity, not mere sensitivity, is the essence of cross-cultural jurisprudence.*[147]

Furthermore, Howes contended that "cross-cultural jurisprudence is essentially an exercise in hybridization - in *crossing* cultures - and there is nothing "trans-cendent" about either its methods or its results. It involves seeing (and hearing) the

[146] What is general jurisprudence? According to William Twining, general jurisprudence can be defined in the context of the following four different meanings: (a) abstract, as in "*théorie génèrale du droit*"; (b) universal, at all times in all places; (c) widespread, geographically or over time; (d) more than one, up to infinity. In relation to the emerging tenets of cultural jurisprudence, how really representative or general is the history of jurisprudence? According to the same author, jurisprudence has not been strictly general in the senses outlined above. Rather, it has essentially been defined in western notions and in the light of Western legal culture. According to Twining, "Anglo-American jurisprudence has been narrow in its concerns, abysmally ignorant of other legal traditions, and ethnocentric in its biases." For details about Twining's opinion on the nature of Anglo-American Jurisprudence, see "Reviving General Jurisprudence" in *The Great Juristic Bazaar* (Ashgate, 2003) Ch 10.

[147] See Canadian Journal of Law and Society SPECIAL ISSUE - CALL FOR PAPERS on the theme "Cross-Cultural Jurisprudence: Culture in the Domain of Law," May 2005, published by the Canadian Law and Society Association.

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."[148] In the words of Nicholas Kasirer, cross cultural jurisprudence it "involves stepping out of "Law's empire" (if only temporarily) and attempting to find some footing in "Law's cosmos".[149]

According to Austin Sarat and Thomas Kearns, "law and legal studies are relative latecomers to cultural studies. To examine law in the domains of culture has been, until recently, a kind of scholarly transgression."[150] In furtherance of this, the authors continue, "[i]n the last fifteen years, (...) first with the development of critical legal studies, and then with the growth of the law and literature movement, and finally with the growing attention to legal consciousness and legal ideology in sociolegal studies, legal scholars have come regularly to attend to the cultural lives of law and the ways law lives in the domains of culture."[151] According to David Howes, "The same could be said in reverse: cultural studies (including anthropology) are a relative latecomer to law and legal studies, but in the last few decades there has been a striking irruption of cultural discourse in the domain of law."[152]

The nature of this transgression is comprehensible in the opinion of Raymond Williams that the word 'culture' was one of the two or three most complicated in the English language and which in British, North American and European anthropology has had complex, contested and very different histories.[153] The fundamental concern of this perspective consists in asking what the nature of the relation between law and

---

[148] 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.
[149] Nicholas Kasirer, "Bijuralism in Law's Empire and in Law's Cosmos" (2002) 52 J. Legal Educ. 29.
[150] Austin Sarat and Thomas Kearns, *Law in the Domains of Culture*, Ann Arbor: University of Michigan Press, 1998, p. 5.
[151] Ibid., p. 5.
[152] 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. 9.
[153] Raymond Williams, *Keywords*. London: Fontana, 1976, p. 87.

morality is from a cultural standpoint. In the basic sense, worthy of note is the view that law and morality are not separate from culture. Moreover, both normative categories of human existence are not above culture; rather, they are part of culture. It is in this sense that this perspective seeks to interrogate the relationship between law and morality in the light of culture.

Etymologically, culture comes from cultivation. The idea of tending crops was applied to the education of people. Then, in the 19th century, people spoke of a society's culture, meaning (at first) the level of mental achievement the society had achieved, and then the way of life, language, ideas, religion, arts and sciences of a society or group.[154] In an intellectual sense, culture is said to be the "act of developing by education, discipline, social experience; the training or refining of the moral and intellectual faculties". In an anthropological sense, culture refers to the "total pattern of human behaviour and its products embodied in thought, speech, action and artefacts, and dependent upon man's capacity for learning and transmitting knowledge to succeeding generations through the use of tools, language and systems of abstract thought." [155] From these definitions, it is clear that a people's culture embraces a lot of things abstract and real, actual and potential, sometimes perceivable or coded in sets of principles for living.

Edward Burnett Tylor said: "'Culture' is that complex whole which includes knowledge, belief, art, morals, law, custom, and any other capabilities and habits acquired by man as a member of society."[156] The highest social value of a given culture is its unity, a holistic construct through which their beliefs and hopes about life and experiences of life can be interpreted and understood. A people's culture,

[154] http://www.mdx.ac.uk/www/study/sshglo.htm#Culture.
[155] Webster's Third New International Dictionary, 1982.
[156] Edward Burnett Tylor, *Primitive Culture*, New York: Harper Torch Books, 1958, p.1,

therefore, concerns the formation, development and manifestation of the creative essence of man as pictured in that given society. This is often achieved through the regulation of mutual relations of man with nature, society and other peoples.

The beginning of morality for instance, its imperatives and taboos at the dawn of human history reflects an understanding that people do not live as isolated individuals but as social groups for which reason they must have some rules for orderly social life. In the same discreet sense, the evolution of law represents man's unique development of the understanding of his society and represents efforts at ensuring the cohesiveness of the society in which he has found himself. To posit a cultural perspective in which the connection between law and morality can be viewed is to claim that law and morality are culturally patterned in a complementary way. In other words, law and morality, culturally, are complementary since they form the several components of the organic unity and whole for that society.

However, functionally they are distinct. Law and morality stand to culture as trees stand to a garden. The reasoning is that a people's culture forms a holism. Law and morality as part of that holism are thus complementary and incorporate a kind of symbiotic relation. An important characteristic of a people's culture therefore is that of the alignment of national and common values, with priority given to common values in consciousness, action, communications and practice. These common values are found expressible in the laws and morals that are ingrained in such cultures.

One consequence of this analysis is that it engenders some elements of relativism. If law and morality are complementary aspects of a people's culture, and it is true that cultures are different, then the cultural perspective in the construction of the relation between law and morality can be questioned in the light of the relativism it elicits. This observation is a very important one. In spite of this, one way of

addressing this problem is that although it is true that cultures are different, and as such law and morality between these cultures will be different, it, however, does not deny the fact that morality and law are complementary aspects of a people's culture.

What the argument sums up to be is that in such other cultures, though what may count as law and morality will be different from another society, but these aspects of that culture will be found to be complementary in as much as it is an alignment of the national and common values expressible in that culture. Contradictory or different cultural systems do not prove the complementariness of law and morality in such cultures; all it proves is that morality and law can be different from one culture to another. A people's culture is a way of understanding their way of life. Law and morality in such a culture stands as some of the indices for understanding that pattern of life successfully.

Thus, culturally, if it is the case that law and morality are aspects of a people's culture, just as religion, etiquettes, and some other aspects are likewise aspects of a people's culture, it can be argued and submitted that the idea of a conceptual autonomy between these manifestations of a given culture is likely to be lacking. In other words, one could be found making an almost correct guess that once we are able to study what the totality of a people's culture is, without much ado, the nature of their religion, law, morality, etc suggests themselves effortlessly to our understanding. A kind of conceptual prediction, from the point of view of what holds in the culture, can give a conceptual clue to what the various manifestations are likely to be. Law and morality, being aspects of a people's culture, entail a kind of complementariness, distinguishable though, but not separable.

This does not rule out differences from one culture to another. But the argument is that once we are aware of what obtains in culture A, this understanding

grants a kind of liberty in predicting and classifying the nature of their laws and morals that pertain to that culture A. The same can apply to culture B whose laws and morals also reflect indiscriminately the total way of life of the people in culture B. Thus, what is acceptable in a culture may not be acceptable in some others. According to Riddall, "so closely may law and morality be intertwined that in some societies the two may be regarded as not forming separate notions. In the societies of the western world, however, the two spheres have generally been seen, notwithstanding the numerous interrelationships, as concepts that are distinct."[157]

Thus, a cultural jurisprudence is bound to breed relativism as it reports the idea of law and its connection to other normative aspects of a people's culture in quite different ways in the way each culture stands to another culture. What the cultural perspective aspires to achieve, in the first instance, is corroborative to the idea of a cultural jurisprudence. In another sense, its modest contribution to the nature of jurisprudential problems consists in the argument that the understanding of law and morality and their connection cannot be understood outside what that culture projects and portrays.

1.6. CONCLUSION

The nature of the problem of the relation between law and morality, in legal philosophy, can be described as conceptual. The problem, however, has serious practical, pragmatic and functional consequences. In very important cases, as observed in legal philosophy, the conceptual nature of legal philosophical controversies appears indefinable since the concepts that each school or worldview adopts are projected as if they do not represent reality and if, perchance, they do, as if those concepts capture the whole of reality. Thus, some of the dangers or difficulties of controversies in legal philosophy that are conceptual in nature consist in

[157] Riddall, op. cit. p. 295.

the fact that concepts are not just constructed but are equally projected as a means of interpreting experience or imposing order on experience.

This can sometimes be misleading since experience is subjected to the world of concepts. What lies within experience is thus subjected to the might of concepts. In consequence, this is bound to breed unrealism and fruitlessness in the understanding of reality. It is reality that is begging for interpretation and that interpretation can be done best when reality is observed and obeyed. As postulated by Finch, differences of opinion in legal theory are not always explainable in terms of set analytical formulae. This is because in his words, "one analysis of law might claim superiority over another simply on the basis of a misunderstanding of the other's nature and purpose."[158]

Conceptualism is thus a problem generating method in legal philosophy. The conceptual nature of the argument that the sphere of morality and law are different, while it contains a good deal of truth cannot be pushed too far since one is empty and meaningless without the other and the other is powerless and ineffective without the one. It is in this sense that G. W. Paton contended that, theoretically, there may be some difficulty in determining the exact distinction between positive law and morality. These difficulties, it seems, account for the lingering controversy between the positivists and naturalists, over the exact relation between law and morality.

In particular, it can be stated that the five perspectives concerning the relations between law and morality presented in this chapter are interconnected. Their interconnectedness also explains, in part, why the problem can be described as a conceptual one. Concepts applied in the explanation, understanding and clarification of one of the perspectives are carried over into the explanation and clarification of the other. Reductively, the mutual transfer of concepts from one realm of explanation to another, while still held onto, becomes an ideological affair.

As extensively discussed by Moses Oke, concepts and ideologies are closely related that it may be difficult for many to distinguish them. Yet, according to him, they are quite distinct and separate categories.[159] One way of establishing the difference between concepts and ideologies is to provide a clear analysis of the nature of concepts and that of ideologies in a separate style. This has the advantage of showing what is inherent in concepts and that are not found in ideologies and vice versa. However, as argued by Oke, the difference between concepts and ideologies can be known if we understand the context that brings them together.[160]

Concepts in general, whether legal, political, moral, exhibit certain features which are used in classifying their nature. There are nine features of concepts discussed by Oke. According to him, concepts are abstract general ideas meaning that they are no concrete things; they are rule-following and context-dependent; they exists in clusters which are called theories; they are tools for coping with the world; they are instruments; they have histories, effects and causes.[161] Apart from these features, concepts also require 'praxis' for content, utility and user competence. Also, concepts are separate from what they describe. More importantly, according to Oke, concepts are theory laden, an indication that both concepts and theories are inseparably bound together.[162]

What should be of interests in Oke's discussion on the nature of political concepts and ideologies is the connection between both. However, reading through the entire pages of the short book, it is difficult establishing what the connection between concepts and ideologies is. But then, an attempt can be made to establish the connection. From a historical perspective, according to Oke, the term ideology

---

[158] Finch, *Introduction to Legal Theory*, 2nd Edition, London: Sweet and Maxwell, 1974, p. 3.
[159] Oke, Moses *The Nature of Political Concepts and ideologies*, Ibadan: Hope Publications, 2001, p. 8.
[160] Ibid., p. 8.
[161] Ibid., see pages 8-16.

was politically neutral and socio-economically innocuous. In terms of meaning, therefore, it stood for the scientific study of ideas in relation to their logic, processes, impact on thought and action, and the pattern of change through time.[163] However, this meaning soon changed assuming, in the process of time, a more systemic or systematic meaning than a scientific one. Thus, in present political parlance, ideology is regarded not as a scientific study of ideas but as a system of ideas. Thus, it changed from being a subject to mean an object of study.[164]

What then is the connection between concepts and ideologies? In our view, it is suggested that the connection between concepts and ideologies consists in the fact that ideologies are most aptly expressible in concepts. No ideology can be understood without being formulated in some concepts or conceptual terms. In other words, since concepts are tools or instruments which "shape our visions as they direct and reflect our political interests"[165], ideologies have found in the nature of concepts visions of reality that are critically important to the ideology in questions. Thus, concepts express the vision inherent in a particular ideology.

Thus, it stands to reason that each ideology has an array of concepts which is internal to the ideology in question. No ideology is expressible in the absence of concepts. Concepts used by an ideooogy explain the vision of reality which the ideology is striving to attain. Thus, concepts and ideology are partners in progress. That is why the misunderstanding of the concepts used in a particular controversy often turn out to be an ideological affair. This is similar to the nature of the controversy between naturalists and positivists over the relation between law and morality or any other controversy in jurisprudence. This concept-ideology nexus is thus

---

[162] Ibid., p. 18.
[163] Ibid., pp. 27-28.
[164] Ibid., p. 28.
[165] Oke, M. ibid., p. 14.

clearly perceivable in the five perspectives highlighted above on the controversy over the exact relation between law and morality.

Thus, for example, the difficulties inherent in the legal enforcement of morality are used in interpreting and clarifying the idea of legal validity and hence the debate on the idea of necessary connection and so on. These difficulties, once interpreted, are then built to form a body of concepts. In the important sense, therefore, the conceptual nature of the problem of the relation between law and morality can be sourced relevantly in the fact that jurisprudence, as a discipline, is subject to a host of problems that are possibly conceptual in the way described above.

It is in this sense, also, that we contend that the controversy between positivists and naturalists, over the relation between law and morality, is not only conceptual in nature but equally ideological. If an ideology is taken to mean a set of fundamental values which a society is implored to strive to imbibe,[166] then the controversy over whether law and morality are separable or not, can be seen in this light as the struggle to peddle a specific vision or conception of a legal system or jurisprudential reality which is thought best for society.

It is the ideological nature of most discussions or problems in political philosophy which explains why such problems linger and are often found to be irreconcilable. The irreconcilable nature of such disputes stems from the fact that the different views entailed in the disputes express the honest ideas of their proponents. In other words, they are consciously held for the overall best interests of the society or societies concerned. The proponents' perception of what the good life ought to be, against what life actually is in a society, motivates the system of socio-political ideas which they propose, support and for which they canvass for that society.[167] In other

[166] Oke, p. 30.
[167] Oke, p. 30.

words, controversies in jurisprudence or political philosophy are encoded in concepts which are found to entail some ideologies with the specific aim of projecting certain values, determined by a whole lot of factors, which are thought practicable and rationally sensible for societal progress. It is in this sense that Oke submitted that

> *An ideology is both prescriptive and normative...Since there is hardly any society with a homogenous set of values, it is to be expected that not all the people in a society will subscribe to the same social values. The values to which people subscribe are determined for them by a number of variables, interests and desires which could be different for different persons and in different situations. Hence, in any given society, there could be a number of competing ideologies, although one usually appears to dominate the others from time to time.*[168]

If we take to Oke's opinion about the nature of ideologies, and its connection with values, then our analysis is not completed. We need to explain whether positivists are induced by any sense of values, since it is a scientific attempt at describing the nature of law, in insisting on the separation of law and morality, and what those values are. This is because it has become somewhat conventional to hold unto the view that that science has no inkling of light for values. It is this disregard for values that often leads scientific ideas to conflict with morality, for instance, or with religion.

Is it then true that the controversy between positivists and naturalists over the relation between law and morality cannot be a war over values? If this is true, the implication is that the controversy between the two jurisprudential schools is not ideological. Marxists, for instance, would regard any reference to ideology in the interpretation, application and understanding of law or society as an engagement in false consciousness of the ruling class. Ideology is thus a suspicious term in Marxist jurisprudence.

[168] Ibid., p. 30.

But then, even if Marxists conception of ideology is acceptable, it appears to be so in one aspect, not in all aspects. It does not dispute the fact that certain ideals or values are projected as necessary for the uplifting of societies. And as long as values are projected from very different conception of reality, whether they are regarded as ideology or not does not remove the fact that such impressions of reality are influenced by the acceptance of certain values or ends which are cherished, nurtured and cultivated.

Thus, at the heart of ideological controversies in political and legal philosophy are set of values which are used in understanding and interpreting what reality is or ought to be and which are encoded as a body of concepts. In a nutshell, it is this concepts which ultimately express the meaning and nature of such values in the ideology which can be regarded, in the words of Oke, "as a broad view of what is, and what ought to be in society."[169]

This leaves our question still unanswered: is the controversy between positivists and naturalists over the relation between law and morality a war over values? If science throws no inkling of light over values, and positivism is a scientific attempt at understanding or establishing the nature of law, then it shows that positivism is not influenced by an appeal to values in describing or establishing the nature of law. To answer this question and falsify this reasoning will require providing more evidences to show that science indeed appeals to values in some respect.

This has been attempted in recent times by Norman and Lucia Halls in their defence of science against the charge of non-integrity and lack of respect for values.[170] In the first instance, Norman and Lucia Hall are of the view that if science is

[169] Oke, p. 32.
[170] Hall, Norman & Hall, Lucia "Science and Religion are Opponents" in *Science and Religion: Opposing Viewpoints*, Rohr, Janelle, (ed.), San Diego: Greenhaven Press, Inc., 1988, pp. 59-64.

said to be in conflict with religion, it cannot be because science lacks respect for values while religion pays much respect for values. In their words,

> *The conflicts of the past were said to be due to excessive zeal and misunderstanding on both sides. Peaceful coexistence and even a measure of syncretism are now assumed to be possible as long as each concedes to the other's authority in their separate worlds of knowledge: that of matter and facts for science, and that of spirit and values for religion. Let us be blunt. While it may appear open-minded, modest, and comforting to many, this conciliatory view is nonsense. Science and religion are diametrically opposed at their deepest philosophical levels. And, because the two worldviews make claims to the same intellectual territory - that of the origin of the universe and humankind's relationship to it - conflict is inevitable.*[171]

For these authors, science possesses a form of integrity and values which is unequalled by any other normative institutions in present human society. It is this respect for integrity and values that makes science, according to Norman and Lucia Hall, invincible and difficult for anyone to live without it while rejecting its findings. The basis for this conclusion consists in the fact that science provides a language of value which transcends cultural boundaries and limitations. In their words,

> *It is often claimed that science can say nothing about values and ethics because it can only tell us what is - not what ought to be. But once again this is a case of attempting to divorce the findings of science from the method of science. Properly understood, science tells us not only what is but also how we must behave if we are to understand what is. Science has succeeded as a cooperative human effort by asserting the belief that the universe can only be understood through the values of integrity and truth-telling. In the process it has become a system of values, and it has provided humankind with a language which transcends cultural boundaries and connects us in a highly satisfying way to all the observable universe. It also has the potential to be used as the basis for a workable and profoundly satisfying system of ethics.*[172]

On our part, there appears to be some questionable moves grounding the conclusions and claims of these authors. But for the sake of argument, we can buy a bit of their analysis and reasoning to justify the position that science throws light on values, even if it is one. This can be argued to guide our reasoning that positivists

---

[171] Hall, Norman & Hall, Lucia "Science and Religion are Opponents" in *Science and Religion: Opposing Viewpoints*, Rohr, Janelle, (ed.), San Diego: Greenhaven Press, Inc., 1988, pp. 59-64, at p. 60.
[172] Hall, Norman & Hall, Lucia "Science and Religion are Opponents" in *Science and Religion: Opposing Viewpoints*, Rohr, Janelle, (ed.), San Diego: Greenhaven Press, Inc., 1988, pp. 59-64, at pp. 63-64.

attempt at describing and establishing law and legal reality is influenced by some set of values which are found so often to be consistent and internal to the nature of law so described. Thus, one way or the other, such values stands at the heart of the contention between positivists and naturalists over the nature of law and the connection that exists between law and other normative institutions or categories in human societies, such as morality.

CHAPTER TWO:
THE SEPARABILITY THESIS

2.1 INTRODUCTION

This chapter is concerned with a thorough and critical assessment of the separability thesis as advanced by legal positivists. Some of the questions it seeks to address are: what is the separability thesis? What is the basis for legal positivists' insistence on the separability thesis and rejection of naturalists' inseparability thesis? How plausible are the arguments of legal positivists on the separability thesis?

Significant approaches to the problem of the nature and definition of law in general necessitated the idea of distinct and specific schools of thought in jurisprudence. Thus, it stands to reason that, if jurisprudential problems are conceptual in nature i.e. the search for the appropriate concepts to use in describing the reality of law, it behoves us to conclude that distinctions and significant differences between the schools of thought in jurisprudence are conceptually framed and defined. Thus, 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 sometimes interesting to know that concepts are not too innocent in the way they are used. It is within the range of possibility that the concepts themselves are ideologically inclined such that their use is instrumental in nature. Thus, if concepts and their usage create problems in jurisprudential discourse, it could be that what motivates and stands at the heart of such conceptual controversies are the ideological mindset that underlie the concepts involved. Unlike the debate between rationalists and empiricists, in epistemology, which could be

described as a family quarrel,[1] the intellectual controversies between the schools of naturalism and positivism have involved much of incredible instances of ideological antagonisms and passionate exchanges[2] which appear irreconcilable. According to W. G. Paton, the dispute in jurisprudential studies today revolves around and is between

> *Analytical jurisprudence (which may be taken here to include the various imperative or positivists theories, the pure science of law, and the Scandinavian (realists), functional (or sociological jurisprudence), and teleological jurisprudence. Some concentrate on the abstract theory of law, wishing to discover the elements of a pure science which will place jurisprudence on the same foundation of objective factors which will be universally true, not on the shifting sands of individual preference, of particular ethical or sociological views.*[3]

A major school of thought in jurisprudence that 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[4] is the school of legal positivism. Ronald Dworkin once described legal positivism as the ruling theory of law.[5] The school of legal positivism has been a major, dominant and leading jurisprudential school with very lively and living discussions on the nature of law and the problems associated with its knowledge, understanding, interpretation and application. Its importance in jurisprudence equals the historical jurisprudential importance of the school of legal naturalism which, going by the last two thousand

[1] Robert C. Solomon and Kathleen M. Higgins, *A Short History of Philosophy*, New York: Oxford University Press, 1996, p. 198.
[2] 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.
[3] W. G. Paton, *Jurisprudence*, Oxford: Clarendon Press, 1972, pp. 3-4.
[4] 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.
[5] R. Dworkin, *Taking Rights Seriously*, 2d ed. (Cambridge: Harvard University Press, 1978) at vii.

five hundred years, has witnessed three significant phases, with their respective eclipses and revivals,[6] and in the present dispensation, feminist jurisprudence making waves all over Europe and the Americas. "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."[7] As a matter of fact, legal positivism remains the most popular, controversial and easily misunderstood jurisprudential school in the last half of the twentieth first century.[8] 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. .*[9]

The series of controversies and (mis)interpretation in which legal positivism has been enmeshed have, on one hand, contributed to its beauty as a legal theory and on the other hand, to its several historical developments, theoretical revisions and modifications. The question then is what is legal positivism? What are the defining features of legal positivism?

2.2 THE NATURE OF LEGAL POSITIVISM

Legal positivism is not subject to just one definition. It will amount to conceptual and philosophical error to assume this. "Despite its profound influence on the development of legal theory and (arguably) legal practice, and despite the considerable efforts of some theorists to undermine that influence," argues

---

[6] Arnold Brecht *Political Theory The Foundations of Twentieth Century Political Thought*, Delhi: Princeton University Press and Surjeet Publications, 1989, p. 138.
[7] Waluchow, W. "The Many Faces of Positivism" in *University of Toronto Law Journal*, XLVIII, No. 3, 1998, p. 1.
[8] 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

Waluchow, "controversy and confusion abound concerning just what it is that legal positivists are supposed to be saying."[10] In this light, Keith Greenawalt has suggested that "the label 'legal positivism' may be mainly a matter of rhetorical force, now usually negative, rather than one that genuinely clarifies serious positions. It may be best to advance actual disagreements free of this label. At a minimum, theorists should explain very carefully just how they are using the label."[11]

More importantly, it stands to reason that, in the light of the advice by Greenawalt, legal positivism cannot be known outside its history and development. The root and development of this major school of jurisprudence, by the by, is traceable outside the confines and terrains of socio-political philosophy in general and philosophy of law in particular. Historically, two vital sources provide the theoretical background for what is today known as positivists' jurisprudence.

The first source can be located in the rise of positivism in Sociology as propounded by Auguste Comte. The second source consists in the rise of the modern notion of sovereignty as peddled in the thoughts of Thomas Hobbes and David Hume. The view that the treatment of the science of social phenomena including law is original with legal positivism is not the whole truth. It is doubtful that anyone ever held this view, but it is in any case false. This view is substantiated in the light of Auguste Comte's notion of 'social physics' as discussed below.

As a matter of fact, the so-called scientificity of legal positivism in relation to analysis of law is both an additive enterprise and a borrowed idea as discussed below. The task of constructing the science of social phenomena is not original to it.

---

now seems the dominant approach to the nature of law, this dominance, opines Brian Bix, has never meant that the approach was without critics."

[9] Letsas, George "H. L. A. Hart's Conception of Law" in *UCL Jurisprudence Review 2000*, p. 187.

[10] Waluchow, W. "The Many Faces of Positivism" *University of Toronto Law Journal*, XLVIII, No. 3, 1998, p. 2.

[11] Greenawalt, K. "Too Thin and Too Rich: Distinguishing Features of Legal Positivism" *The Autonomy of Law: Essays on Legal Positivism* ed. Robert P. George, Oxford: Clarendon Press, 1996, p. 19.

According to Leslie Green, "Legal positivism is here sometimes associated with the homonymic but independent doctrines of logical positivism (the meaning of a sentence is its mode of verification) or sociological positivism (social phenomena can be studied only through the methods of natural science)."[12]

In the first instance, Auguste Comte founded what is generally known in sociology as the school of positivism. Even though the meaning of the term in matters of law and jurisprudence differs from that associated with the same term in science and sociology, there seems to be a shared sense of mission in method. Positivism, as an intellectual approach and method, was of unparalleled significance for Comte in his study of social reality. In the significant sense, it marked the triumph of science over the religious and metaphysical medium for the transmission of knowledge and the explanation of social reality.

The success of science especially in the explanation of the natural world convinced Comte of the need for such a positivistic approach in understanding and explaining the social world. This heralded the emergence of what Comte himself called 'social physics' or what was later renamed 'sociology'. Its main emphasis consisted in the view that science, as a human activity, is the solver of all social problems, including moral problems. In terms of reflection, however, this may be far from the truth.

Moral problems and questions are rarely within the province of science to solve. Not that science has not been helpful, but then, it is just the case that science cannot state what the moral goals of a state are and should be. Meeting with the set of moral goals necessary for societal development will require decisions and actions

[12] Green, Leslie, "Legal Positivism", *The Stanford Encyclopaedia of Philosophy (Spring 2003 Edition)*, Edward N. Zalta (ed.), URL = <http://plato.stanford.edu/archives/spr2003/entries/legal-positivism/>.

which are purely outside the reach of science. But then analysis must go further than this.

In Comtean positivism, an impartial understanding of social reality can only be obtained when proper scientific methodologies are applied. The methods of observation and measurement in an objective way, it is believed, can help us arrive at indelible and impeccable truth about social reality. Apart from Comtean positivism, some twentieth-century positivists, called the Neo-positivists or Logical positivists, also provided the intellectual and theoretical foundation for the emergence of positivism in law and jurisprudence.

The Neo-positivists, led by Rudolf Carnap and Otto Neurath, ran the tenets of positivism in sociology to its logical extreme. According to the Neo-positivists, scientific investigation should commence from and be based on what is given to perception and logical reasoning. From this, three essential features characterized the postulation of the Neo-positivists. These are (1) insistence on strictly physicalist or behaviourists' methods, which implies the rejection of any merely introspective methods of psychology; (2) elimination of metaphysical terms in any type of sentences in scientific work; and (3) the designation of any synthetic sentence which is not ultimately verifiable through perceptions as not only "non-scientific" but "meaningless." A critical reflection on the Neo-positivists' criterion of meaning sounds objectionable since it conflicts with certain aspects of the usage of words and construction of sentences in daily life. Disregarding this, this is the first source of the emergence of positivism in jurisprudence and matters of law.

In the field of law and jurisprudence, this positivist inclination is rife and heavily borrowed. The meaning of positivism in law and jurisprudence may be different from that associated with the term in science and sociology as reflected in

the works of Auguste Comte, and his predecessors, Jacques Turgot and Henri de St. Simon, yet it is still a truism that the intellectual foundation and background of positivism in law and jurisprudence is amiably disposed to positivism in science. Even though there are historical connections and commonalities of temper, they differ in very significant details. It is this sense of intellectual fervour that Jeremy Bentham, the father and founder of classical legal positivism, brought into focus in his definition of the mission statement of legal positivism.

The second source of legal positivism can be deciphered in the propagation of the modern notion of sovereignty as inaugurated in the thoughts of Jean Bodin (1530-1596) and vigorously championed in the works of Thomas Hobbes (1588-1679). This line of positivism was much older than that of Auguste Comte. The central thesis of positivism as advanced by these thinkers was tied to the idea of sovereignty. The modern notion of sovereignty emphasised the importance of the location of some superior power in a state in a way that is both secular and positivistic.

The secular and positivistic nature of law as highlighted in this theory of sovereignty posed a serious attack on the naturalists' conception of law. In other words, from the perspective of a sovereign power existent in a given political society who could issue laws for the governance of the political society in question, natural law ended up being seen as nothing more than mere statement of human impulse. A positivistic account of law, it is opined, helps in grounding the inalienability of rights in a sovereign power existing in a state. It also assists in justifying the belief in inalienable sovereignty as advocated in Jean Jacques Rousseau's theory of General Will.

The positive, permanent and important advantage of this notion of sovereignty for legal positivism was achieved through the thoughts of David Hume who contended

that true empiricism includes the rejection of natural law as a system of norms whose normative validity cannot logically be treated as an objective fact. This is held to be so in as much as, as a system of norms, the application and force of natural law lies in a form of relativism i.e. the relative viewpoint of those who apply them.[13] In fact, Hume argued that a normative statement could not be inferred from a purely factual one. There is, he claims, an unbridgeable gap between "ought" and "is." This is what Hume regarded as the fallacy of deriving "ought" from "is."[14]

The basic thesis underlying these strands of positivism was developed hundred years later by Jeremy Bentham (1748-1832) and his disciple, John Austin (1790-1859). As postulated by these scholars, legal positivism designates the theory that only those norms are juridically valid which have been established or recognized by the government of a sovereign state in the forms prescribed by its written or unwritten constitutions. No divine law or natural law is juridically valid, according to legal positivism, unless so recognized and duly formalised by the state or its government.[15]

Given this kind of background, it was understandable why Bentham and his disciple, John Austin, sought for ways of dethroning natural law and insisted on the need to advance a theory of law that was not only rational but equally scientific in content and scope. According to tradition, Bentham's efforts in this light consisted in the painstaking advocacy of the principle of utility.[16] By this principle, Bentham sought to make himself the Newton of the legal and moral world by establishing the principles

[13] Freeman, *Lloyd's Introduction to Jurisprudence*, London: Sweet and Maxwell, 1994, p. 206.
[14] David Hume, *Enquiry Concerning the Principles of Morals*, chp. 5
[15] Arnold Brecht *Political Theory The Foundations of Twentieth Century Political Thought*, Delhi: Princeton University Press and Surjeet Publications, 1989, p. 183.
[16] Scholars have argued that the utility principle was not original to Bentham. As a matter of fact, Bentham himself suggested that Priestly was "the first who taught my lips to pronounce this sacred truth." Letwin was of the view that Bentham's use of the utility principle was derived from many sources. In his words the utility principle "had been suggested to him by everyone, or at any rate, he attributed his inspiration to different authors - Beccaria, Helvetius, Bacon, Hume. In fact, from each of them Bentham drew only what he was looking for. He borrowed phrases but the principle of utility as he came to understand and use it was entirely his own invention." See Letwin, *The Pursuit of Certainty*, 1965, p. 139.

of an experimental science governing the legal and moral world just as Newton had formulated the fundamental laws of the physical world.[17]

Bentham's novelty and innovation in this direction is to be given much credit but it is still yet to be proved how the principle could provide a rational and scientific account of legal phenomena. Truly, the utility calculus was conveyed in the terse but profound statement as the greatest happiness of the greatest number, what is left to be demonstrated is its role and place in the building of a scientific theory of law. At the level of perception, Bentham's utility principle was only innovative[18] as far as the philosophical justification of ethics was concerned, but it was insufficient, on its part, to build a scientific theory of law. Even then, in matters of ethics, the favourite phrase of the utility principle has been described as one of the most incredible instances of primitive or crude psychology[19] in a relational sense. According to John Plamenatz, "the truth is that it is not possible to make sense of what Bentham is saying."[20]

This may, sometimes, account for the distinction Bentham himself made between expository jurisprudence and censorial jurisprudence. The former refers to a consideration of the science of law i.e. law as it is, while the latter refers to the science of legislation. Expository jurisprudence consists of the analysis of the law 'that is', without due regard to its moral element or character. This is perhaps what Bentham's student, John Austin, classified as analytical jurisprudence which, to him,

---

[17] See Freeman, M. D. A. *Lloyd's Introduction to Jurisprudence*, London: Sweet and Maxwell, 1994, p. 206.

[18] The inventive nature of Bentham's philosophy has been questioned by one of his ablest exponents, Elie Halevy. According to Halevy, Bentham can be regarded as a great arranger of ideas, not a great inventor of ideas. The term invention is here construed to mean the discovery of deep philosophical insight, not the invention of specific legal ideas. In the latter case, Bentham has been regarded as more fertile than any other major figure of western intellectual history. See Friedrich, *op. cit.*, on Bentham's Utilitarianism, p. 98.

[19] See for instances of this criticism, Freeman, M. D. A. *op. cit.*, p. 207; Carl Friedrich, *The Philosophy of Law in Historical Perspective*, Chicago: University of Chicago Press, 1963, p. 97.

[20] John Plamenatz, *The English Utilitarians*, Oxford: Oxford University Press, 1949, p. 71.

is the province of jurisprudence.[21] Censorial jurisprudence, for Bentham, is a branch of morals concerned with how men's actions can be framed and tailored in such a way that they will educe the greatest quantity of possible happiness.[22]

Sometimes, the value and importance of the creed of contemporary legal positivism as inherited from Bentham and Austin, considering this historical background, cannot be known if it is not contrasted with the very jurisprudential theory it was out to dethrone: legal naturalism. 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 much of what is law incorporates a mystic sense of unity and organic growth in human affairs. Rather than elevate the rationalistic standards and universalizing tendencies reminiscent of the eighteenth century, the Romantic Movement not only elevated standards of feelings and imagination but also gave heed to the doctrine of the uniqueness of every nation, historical period and civilization in the evolution of its jurisprudence.[23]

The second movement was legal positivism. In the field of legal and political philosophy, classical legal positivism was heralded by Bentham's critique of Natural Law. Before Bentham, Hume had offered devastating criticism of natural law theory by recourse to the tenets of true empiricism. According to Hume, the validity of normative rules cannot be logically derived from objective fact since they are basically subjective to individual interpretation. To this end, according to Hume, the

[21] John Austin, "Law as the Sovereign's Command" in *The Nature of Law*, M. P. Golding (ed), New York: Random House, 1966, p. 77. For Austin, the matter of jurisprudence is positive law: law, simply and strictly so-called: or law set by political superiors to political inferiors.
[22] Bentham, J. *Principles of Morals and Legislation*, chap. 17.
[23] M. D. A. Freeman *Lloyd's Introduction to Jurisprudence*, Sixth Edition, London: Sweet and Maxwell, 1994, p. 783.

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 ascertainability and validity without recourse to subjective considerations. Thus, for Hume, morals are to be distinguished and held separate from positive laws.

It was then left for Jeremy Bentham to work out the fine details of the Humean distinction between positive laws and morals. 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,[24] fictitious in character, but equally as "the pestilential breath of fiction."[25]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.[26] Again, Bentham's attack of the naturalist thesis of inseparation consisted in the fact 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.[27] This thesis can be intelligently deciphered in the following:

1. Laws for the guidance of man and the whole human race consist of fundamental principles superior to any man-made rules;

2. Man-made rules (i.e. positive laws) are supposed to conform to these immutable, absolute law of Nature;

[24] Bentham, J. *Anarchical Fallacies*, Works, vol. 2, p. 501.
[25] Bentham, J. *Fragment on Government*, pp.100-101.
[26] Bentham, J. *A Fragment on Government*, edited by Wilfrid Harrison. Oxford: Basil Blackwell, 1948, p. xx.
[27] 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.

3. Man-made rules derive their validity from these immutable, universal absolute law of nature;

4. These principles are discernible by reason in the natural order of things in the universe;

5. Man-made laws that fail to conform to these principles lose their validity and hence do not create a sense of obligation.

This thesis has been amplified and formulated in various ways to constitute a family of forms embracing the whole natural law tradition. Precisely, going by the last two thousand five hundred years, three significant phases of the natural law theory, with their respective eclipses and revivals, can be accounted for.[28]

The first was the era of the Greeks. Natural law amongst the Greeks had a pagan origin and approach. This was prior to 400 B.C. This conception of natural law was reminiscent of the thought of eminent Greek philosophers such as the Sophists, Plato, Aristotle, and more thoughtfully, amongst the Stoics.[29] This era of natural law thinking was superseded, around 400 A.D., by the concept of Divine Law as found in the thoughts of Saint Augustine. In the thirteenth century, eight hundred years later, the concept of natural law witnessed a dramatic revival when the thoughts of Aristotle, representing the Greek tradition on the idea of natural law, was conflated with the canons of faith as expounded in the thoughts of Saint Thomas Aquinas. Thus, natural law (Aristotle) and Divine Law (Aquinas) were seen to be compatible in man's attempt to stumble and gaze at the truth. Such 'truths' are contained in the "good" disclosed by nature which is contained within God's plan for the universe (*lex aeterna)* and which every rational man is not only expected to participate in consciously (*lex*

[28] Arnold Brecht *Political Theory The Foundations of Twentieth Century Political Thought*, Delhi: Princeton University Press and Surjeet Publications, 1989, p. 138.
[29] L. Weinreb, *Natural Law and Justice*, chap. 1, Cambridge, Massachusetts: Harvard University Press,1987.

naturalis) but also, according to Aquinas, can be insightfully discovered by recourse to revelation (*lex divina).*[30]

The second eclipse of natural law, away from the conflation of Aristotelian and Aquinas' theory, was achieved in the sixteenth and seventeenth centuries with the resurgence and growing consciousness towards the theory of sovereignty. In the principal sense, the theory of sovereignty as it emerged during this period can be likened to a two-edged sword: it heralded the triumph, two hundred years later, of positivism on one hand and paved way for the demise of naturalism on the other hand. The major douse which the concept of sovereignty had on natural law consisted in the significant enhancement it placed on each country's positive law as the basic key to its jurisprudence. While the idea of 'natural law' was experiencing a moribund fortune, it received a resuscitation and revitalization, in the same century, with the introduction of the timely but debatable concept of natural rights. The latter was more profoundly treated in the political philosophy of the British empiricist, John Locke.

Two hundred years later, the doctrine of natural rights and natural law suffered an unsparing and devastating criticism from the school of positivism. The herald of this demise was significantly tied to the sway of empiricism which provided the theoretical, philosophical platform on which legal naturalism was attacked.[31] The

[30] Saint Aquinas, "Law as an Ordinance of Reason" in *The Nature of Law* in M.P. Golding, New york: Random House, Inc., 1966, p. 13.

[31] One of the attacks which empiricism provided against natural law was supplied by David Hume. According to Hume, true empiricism rejects the canons of natural law in as much as the validity of normative rules cannot be logically treated as an objective fact. Thus, a scientific study of society and civil government, Hume contends, rules out the validity of natural law. But while this is true, it never appeared really true that Hume rejected natural law in the outright sense. For example, Forbes contended that to Hume can be attributed 'a modern theory of natural law', an empirical version of the fundamental principles of natural law. This meant a science of morality and law in a science of man which is neither based on any religious hypothesis nor universal or superior meaning. An act is moral or just in case it is possible to find a motive considered good independently of the sense of virtue of the action. Unfortunately, it is a disaster to note that humans often have no natural inclination to be just since the passions themselves are socially destructive. See D. Forbes, *Hume's Philosophical Politics*, 1975, chap. 2.

ultimate outcome of this attack was the powerful and authoritative establishment of legal positivism. This is the third eclipse of legal naturalism.

According to Brecht, legal naturalism, as advocated in the idea of natural rights, was attacked form six angles. The first attack was from Humean scepticism; the second from Kant's theory of knowledge which criticized the excessive use of "pure reason"; the third from the moralists, such as Edmund Burke who thought legal philosophy should emphasize duties and tradition rather than natural rights; the fourth from Utilitarians, like Bentham and Mill, who emphasized the concept of utility rather than natural rights or law; the fifth from modern positivists such as Austin and his master Bentham. Both painstakingly taught the jurisprudential importance and relevance of positive laws as enshrined in the sovereign power of the monarch or parliament; and lastly, from the historical school of jurisprudence, (or historicists as sometimes called), such as Herder, Savigny[32] and Henry Maine who stressed the idea of *Volksgeist* as the national spirit interred in each country's legal culture and history.[33]

The ruins of natural law were gathered up by the thought provoking analyses of two German philosophers: Kant and Hegel. Precisely, Hegel's celebrated notion of the Absolute or World Spirit brought a refreshing relief to the thrice dead notion of natural law. Hegel's idea of the World Spirit exalted reason once more to an objective and creative position. The remains of German idealism was carried on, in defence of natural law, in the thoughts of T. H. Green and essentially, by the thoughts of Radbruch.[34]

[32] According to F. K. Savigny, the *Volksgeist* is a unique, ultimate and often mystical reality linked to the biological heritage of a people. See Stone, *Social Dimensions of Law and Justice*, 1966, p. 102.
[33] Arnold Brecht *Political Theory The Foundations of Twentieth Century Political Thought*, Delhi: Princeton University Press and Surjeet Publications, 1989, p. 139.
[34] Arnold Brecht *Political Theory The Foundations of Twentieth Century Political Thought*, Delhi: Princeton University Press and Surjeet Publications, 1989, p. 140.

In the light of the growth of the tradition and the multiplicity of views expressed within the tradition, the following attributes are deducible from most Natural law writings. These are:

1. Ideals which guide legal development and administration
2. A basic moral quality in law which prevents a total separation of the ▫is▫ from the "ought"
3. The method of discovering perfect law
4. The content of perfect law deducible by reason
5. The conditions *sine quibus non* for the existence of law[35].

From the above, three primary features constitute the core of natural law theory. One, a duality of legal existence: positive law and natural law. Two, positing a hierarchical relationship between the positive law that 'is' and the natural law that 'ought' to be. Three, abridgement of the gulf between 'what is' and 'what ought to be'[36].

The distinctive attributes of natural law, as set out in the outline above, rests upon certain assumptions. These assumptions, inherent in legal naturalism as a legal and socio-political doctrine, consist in the following:

1. There exists a basic law of nature;
2. All things are obliged in nature to conform to the dictates of nature;
3. There exists an objective moral order to which man must conform in order to achieve his desired ends;
4. This applies to everything in the universe;

[35] Dias, R.W.M. *Jurisprudence*, London: Butterworths and Co., Publishers, Ltd., 1985, p. 470.
[36] See Olufemi Taiwo, *Legal Naturalism - A Marxist Theory of Law* (New York: Cornell University Press,1996) pp. 37 - 38.

5. The essence of man is to achieve happiness, peace and the common good. Hence, all human rules and regulations must conform to this end.[37]

Given this panoramic view of the history of legal positivism and the definitional thesis of its arch-rival theory, natural law, legal positivism, in its contemporary stance and historical context, can be defined within the Hart-inspired strain to consist of certain propositions. The importance of these propositions, or contentions as used by H. L. A. Hart, is to be understood in the light of the possibility of misunderstanding of the term in contemporary jurisprudence. In the words of Hart, "the nonpejorative name "legal positivism" like most terms which are used as missiles in intellectual battles, has come to stand for a baffling multitude of different sins."[38] The 'sinful' propositions, according to Hart, are:

(1) The contention that laws are commands of human beings;

(2) The contention that there is no necessary connection between law and morals or law as it is and ought to be;

(3) The contention that the analysis (or study of the meaning) of legal concepts is (a) worth pursuing and (b) to be distinguished from historical inquiries into the causes or origin of laws, from sociological inquiries into the relation of law and other social phenomena, and from the criticism or appraisal of law whether in terms of morals, social aims, "functions," or otherwise;

(4) The contention that a legal system is a closed logical system in which correct legal decisions can be deduced by logical means from predetermined legal rules without reference to social aims, policies, moral standards; and

[37] Jim Unah, *Fundamental Issues in Government and Philosophy of Law*, Ikeja: Joja Press Ltd., 1993, pp. 112-114.
[38] Hart H.L.A., "Positivism and the Separation of Law and Morals", *Harvard Law Review*, vol. 71 (1957-58), p. 595.

(5) the contention that moral judgments cannot be established or defended , as statements of facts can, by rational argument, evidence, or proof (noncognitivism) in ethics.[39]

Comparatively, the Hartian conception can be juxtaposed with the analytical framework provided by the Italian legal scholar, Norberto Bobbio. According to Bobbio, the following can be itemised as reflecting the nature and heart of legal positivism:

(1) A neutral scientific approach to law;

(2) A set of theories depicting the law as the product of the modern state, claiming that the law is a set of positive rules of human origin, and ultimately amounting to a set of statutes, collected in legal systems or orders;

(3) An ideology of law that gives a value to positive law as such, implying that it should always be obeyed.[40]

At the level of reflection, Bobbio's conception of legal positivism appears commendable. After all, legal positivism is presented not only as science but equally, quite unlike most texts on legal positivism, as a legal ideology. Heuristically, therefore, Bobbio's conception reads like a grammar of intelligibility requiring that the science of law cannot be divorced completely from certain presuppositions which translate, sometimes, to form its ideological character. In fact, according to Mario Jori, Bobbio's conception of legal positivism, notwithstanding the inaccessibility of language (in terms of the English language) to western readers, remains by far the

[39] Hart H.L.A., "Positivism and the Separation of Law and Morals", *Harvard Law Review*, vol. 71 (1957-58), pp. 601-602.

[40] Bobbio, N. *Legal Positivism (Il Postivsmo Giuridico)*, Turin: Giapichelli, 1961.

clearest text written on the controversy between legal positivism and legal naturalism.[41]

However, Hart's conception is not without its merit. The merit of Hart's conception of legal positivism, in relation to the idea of law and morality, is multifaceted. In the first instance, the conceptual reality that legal positivism projects in the sphere of jurisprudential controversies is sensitive to language and linguistic analysis, a task which is basically the reserve of English philosophers.

As contended by Hart, clarity has been one important tool of jurisprudential analysis which English legal thinking possesses. In fact, Hart's legal philosophy can be regarded as sourced in the evolution of linguistic philosophy which was traceable to Wittgenstein and principally, for Hart, in the works of J. L. Austin. Citing J. L. Austin, Hart wrote that: "In searching for and finding definitions we are looking not merely at words... but also at the realities we use words to talk about. We are using a sharpened awareness of words to sharpen our perception of the phenomena."[42] It is our opinion that Hart's conception of legal positivism captures that reality in that the modern interpretation and understanding of the separability thesis by legal philosophers was not only supplied within this linguistic framework by Hart but also borrowed from him.

More important also is the view that Hart's conception of legal positivism is preferred in as much as it is the case that his conceptual analysis is both historically and theoretically reflective of legal positivism. As defended by Letsas, "Hart's shadow hovers... his theory remain by far the most interesting and internally consistent version of legal positivism. This is why we need to go back at Hart's writings and explore his insights about law and legal theory."[43]

---

[41] Jori, M. "Legal Positivism" in *Routledge Encyclopedia of Philosophy*, Edward Craig (ed.), New York: Rourledge, 1998, p. 521.
[42] Hart, H. L. A. *The Concept of Law*, Oxford: Clarendon Press, 1961, p. 38.
[43] Letsas, G. "H.L.A. Hart's Conception of Law", *UCL Jurisprudence Review* 2000, p. 187.

Furthermore, Hart's reflective understanding and itemisation of legal positivism is significant to the entire history of legal positivism because Hart's place is that of a bridge between early positivism and its contemporary brand. It is no wonder that William Twinning regarded Hart's work as "the orthodox picture" of legal positivism "following in the footsteps of the expository aspect of Bentham's 'universal jurisprudence,' and Austin's 'general jurisprudence, while keeping a foot in particular jurisprudence.[44]

And what is more, Hart's analysis is privileged in the sense that it captures the nature of legal positivism in the controversial terrain in which it is naturally conceived and coined. As a matter of fact, apart from the controversial thesis which Austin put up in defence of legal positivism, and which has earned a heavy dose of criticisms from legal theorists, Hart and his work, *The Concept of Law*, are said to be the Jonah in the ship of legal positivism. Unfortunately, while there was much of expedience in throwing Jonah away from the ship in order to have lasting peace, it has been speculated that Hart remains not only controversially important for legal positivism but equally important as a clue to the resolution of the intellectual problems which legal positivism seems to be beleaguered with in contemporary jurisprudential disquisitions. Thus, the beauty of the Hartian model consists in the fact that it is less concocted in terms of legal controversies.

One controversial opinion and contention excellently captured in the Hartian formula about the nature of legal positivism and which is of critical interest to this piece of critical interrogation is the second contention which states that there is no necessary connection between law and morals, or law as 'it is' and law as it ought to

---

[44] W. Twining, 'General and Particular Jurisprudence' in S. Guest, ed., *Positivism Today*, Aldershot: Dartmouth, 1996, 119 at 120-5.

be. Often termed the separability thesis, this thesis stands as perhaps the most controversial contention for which legal positivism is known in jurisprudential debate. According to Waluchow,

> *Separability thesis ...is the version of positivism to which Hart subscribed and to which he is theoretically committed as a legal positivist. It is also the version of positivism advanced by Austin and Bentham, as well as the only conceptual version of positivism which provides a theoretically adequate account of Anglo-American legal practice.*[45]

According to Oladosu, in according conceptual priority to the various dogmas of legal positivism, though the separability thesis is derived from the positivists' conception of law as social facts, for analytical purposes, the separability thesis has turned out to be given logical priority in the face of important disagreements on what the contents of social facts are.[46]

Apart from the fact that the thesis has raised the pedestal of positivists approach to law and legal concepts in a controversial form, of equal importance is the fact that the claim of the thesis and the counter claims offered against it have enlivened the content of jurisprudence beyond the mundane. The question then is this: what is the meaning of the separability thesis?

2.3 THE SEPARABILITY (OR SEPARATION) THESES)

The separability thesis as championed and emphasised by legal positivists is an important thesis and idea in jurisprudence. But then it is no misnomer to contend that jurisprudence in general is at home with one separation thesis or the other. Even amongst contemporary legal positivists and those with sympathetic feelings towards it,

---

[45] Waluchow, W. "The Many Faces of Positivism" *University of Toronto Law Journal*, XLVIII, No. 3, 1998, p. 5.

[46] Oladosu, Jare (2001). "Choosing a Legal Theory on Cultural Grounds: An African Case for Legal Positivism". *West Africa Review*: 2, 2 [iuicode: http://www.icaap.org/iuicode?101.2.2.2]. This view may require some qualifier here since it is not the total truth. Contemporary reflections among legal positivists on the seperability thesis is not without some amount of disagreements and rethinking. Such rethinlking has occasioned the birth of a vital distinction between inclusive legal positivism and exclusive

attempts have been made to establish that within positivists' creed, there are more than one separation or separability theses.[47] What we shall then embark on is to distinguish these brands of separation thesis as found in jurisprudence contending, as it were, that one separation thesis is not altogether unique in the light of jurisprudential debate although one may be more controversial in nature than the others.

What accounts for this trend may consist in the practical effects that such contention may be found to entail. Moreover, the sustaining factor in such endless controversies over one separation thesis may border on the irresistible status of the jurisprudential school sponsoring such legal ideas. Thus, the fall of a school of thought or the dearth of proponents of such legal ideas explains, in a sense, the numbing silence over issues and ideas that are interlocked with such schools of thought.

Characteristically, therefore, separation theses in jurisprudence are fallout of a general problem connected with the interpretation and understanding of the nature of law. Thus, it is in the light of the analysis and provisions of answers to the question of what law is that one separation thesis or the other had been discovered.

2.3.1 FEMINIST JURISPRUDENCE AND THE SEPARATION THESIS

Early and contemporary feminist jurists contend that traditional jurisprudence is replete with dissipating instances and legitimation of what they call the separation thesis. Feminist agitation against the separation thesis may not be readily understood except when treated in the light of what feminist jurisprudence is all about. In specific terms, feminist jurisprudence is the revolt against the "habit of obedience" in

---

legal positivism with respect to the separability thesis. This distinction is a rough one and shall be explained and clarified later in the course of this chapter.

[47] See, for instances, James Morauta, "Three Separation Theses" in *Law and Philosophy*, 23: 111-135, 2004; David Lyons, "Moral Aspects of Legal Theory," in *Moral Aspects of Legal Theory*, Cambridge: Cambridge University Press, 1982, pp. 64-101, at page 100.

societies which treat the feminine gender and issues[48] of central concern to them as a microcosm of both the well-ordered state and "pious congregation" with the male standing in for civil and divine authority.[49]

In another light, feminist jurisprudence can be conceived as a reactive theory. It is a reaction to the existence of conceptual oppressive frameworks in the legal order. These frameworks ascribe the place of supremacy to traditionally male gender-identified beliefs, values, attitudes, and assumptions. These masculine values are taken as the only, or paradigmatic, or the more highly valued ones than female gender-identified ones.[50]

The separation thesis, as questioned by feminist jurists, stands at the heart of traditional jurisprudence's conception of what it means to be a human being. Each part of jurisprudence, according to Murungi, represents an attempt by human beings to tell a story about being human.[51] The separation thesis according to feminist jurists means the deliberate distinction and separateness created about our humanity. The separation thesis, according to Robin West, is the view that human beings are materially and physically separate from each other.

The question is whether this separation thesis is radically innovative and of any consequence for the nature of law. If the issues are examined carefully, feminist jurists can be charged for the error of raising the obvious. Regardless of our predilections, humans, naturally, are separate from each other in terms of spatio-

[48] There are many disagreements amongst feminist legal theorists over such issues but minimal consensus on such issues seems to be clustered around what Patricia Smith calls "spotlight controversies." These issues are, but not limited to, the following: abortion, pornography, affirmative action, sexual harassment and date rape. According to Smith, public understanding and assessment of these issues have sometimes bordered on the enjoyment of sensationalism and oversimplification. See Smith, P. "Four Themes in Feminist Legal Theory: Difference, Dominance, Domesticity, and Denial", in *The Blackwell Guide to the Philosophy of Law and Legal Theory*, edited by Golding, M. P. and Edmundson, W. A., Malden, Massachusetts: Blackwell Publishing Limited, 2005, p.90.

[49] William, W. "A Philosophical Analysis of Feminist Jurisprudence" in *Readings in Sociological Studies*, vol. II, edited by P. C. Onyia, C. Owoh and P. C. Ezeah, Enugu: Rainbow Publishers, 2002, p. 9.

[50] Idowu William, "Feminist Epistemology of Law: A Critique of a Developing Jurisprudence" in *Ife Juris Review*, vol. 1, 2004, p. 6.

temporal categorisation. To have conceived of the separation thesis as offensive to women's condition, in general terms, is to be found dulling the sensibilities of jurisprudential disquisitions.

However, on a second thought, it seems the grouse that feminist jurists tend to have against the separation thesis as peddled in traditional jurisprudence is more than what meets the eye. At the root of the separation thesis is a basic presupposition about law. Feminist jurisprudence tends to see the origin of law as sourced in the idea of separation. In the words of West, "by virtue of their shared embrace of the separation thesis, all of our modern legal theory...is essentially and irretrievably masculine."[52] By accepting the separation thesis, law thus turns out to be the acceptance of the epistemological and moral prior-ness of the individual over the collectivity. In the psychoanalytic perspective, the self is defined separately from the other.

The obvious conclusion is that an acceptance of separation thesis is an endorsement or legitimation of the jurisprudence of masculinity. Masculine jurisprudence is thus antithetical to the development of not just feminist jurisprudence but a truly humanist jurisprudence or an ungendered jurisprudence.

The development of an ungendered jurisprudence can be realised, therefore, if only the separation thesis, as defended in traditional jurisprudence and as crucially sourced in masculine jurisprudence, is not made fundamental to the origin of law but replaced with the connection thesis. The adoption of the connection thesis - the view that women are actually and potentially materially connected to other human life - is the political condition for the eradication of patriarchy. Thus, the connection entails the unmasking of patriarchal jurisprudence.

---

[51] Ibid., p. 525.
[52] West, R. "Jurisprudence and Gender" in *University of Chicago Law Review*, 55, 1, 1988.

2.3.2 HISTORICAL JURISPRUDENCE AND THE SEPARATION THESIS

In jurisprudence, another sort of separation thesis, particularly located within the ambience of the historical school of jurisprudence, has to do with the legal status of customs. In principal terms, the historical school of jurisprudence, as envisioned by Sir Henry Maine, consisted of attempts to study the nature and development of law in its historical context and as it exists in underdeveloped societies of the world. As noted by Pospisil, Sir Henry Maine's contribution to jurisprudence via the method of historical inquiries into the origin of law consisted in the fact that he "blazed a scientific trail into the field of law, a field hitherto dominated by philosophizing and speculative thought."[53]

One of the interesting discoveries and conclusions of historical jurisprudence consisted in the fact that many primitive or tribal societies of the underdeveloped societies had no laws but only customs. The basis for this conclusion cannot be farfetched: primitive societies were thought to lack formal legal codes, courts, policemen or prisons, the general institutional framework for existence and operation of law. Thus, from this view point law was defined to be separate, distinguishable and perhaps, superior to customs.

It is in this light that Diamond posits a separability thesis between law and custom. In his words, "the customary and the legal orders are historically, not logically related. They touch coincidentally; one does not imply the other. Custom, as most anthropologists agree, is characteristic of primitive society, and laws of civilisation."[54] On his part, William Seagle opines that the attempt to treat law as customs or law and customs as the same results in confusion. According to him, the essential character of

[53] Pospisil, *The Anthropology of Law*, New York: Harper and Row Press, 1971, p. 150.
[54] S. Diamond, "The Rule of Law versus the Order of Custom" (1971) 38 *Social Research* 42 44

primitive order is not law and cannot be law but customs which goes to show their differences. In his words,

> *Whether primitive societies have law or custom is not merely a dispute over words. Only confusion can result from treating them as interchangeable phenomena. If custom is spontaneous and automatic, law is the product of organised force. Reciprocity is in force in civilised communities too but at least nobody confuses social with formal legal relationships."*[55]

In his conclusion, the rendition "customary law", apart from being semantically informative, also portrays the recognition given to the distinction between law and custom. Thus, while law was enforceable by these institutional means such as described above, customs was enforceable, opines Hoebel, by religion and magic.[56] Evans-Pritchard, while describing the legal universe of the Nuer of Sudan constates that the Nuer of Sudan had no law but only conventional compensatory systems which were bereft of central authority to enforce those compensations for crimes such as adultery, murder etc.[57]

The many things that are false in this analysis and conclusions are, however, glaring. One of such falsehood consists in the ethnocentric prisms and mindset used in the evaluation of such societies. Sometimes, legal ideas that are at home in the western world are used as standards in judging and assessing other societies such that once those ideas are found missing, perhaps, an ethnocentric conclusion is inevitable. Besides, there is still an on-going controversy over what the meaning of law is such that it becomes difficult to determine what to include and what to exclude.

As a matter of fact, the presence of systems of control, order and justice, no matter how rudimentary is a telling argument that the analysis of law is not subject to a unilateral or mono-causal kind of investigation. Even if we accept the argument that

[55] Seagle, W. *The History of Law*, New York: Tudor Publishing, 1946, p. 35.
[56] Hoebel, *Law of Primitive Man*, Cambridge, Massachusetts: Harvard University Press, 1954, pp. 257-260.
[57] Evans-Pritchard, *The Nuer of Southern Sudan*, Oxford: Clarendon Press, 1940, p. 162.

law refers to a set of social facts, such facts need not be encoded in the kind of institutional majesty on display in western culture nor should the content be the same all over. The content of such facts may likely reflect some dose, it is supposed, of relative considerations that are possibly in consonance with the history and the evolution of such societies.

Malinowski's prior study of the Trobrianders' society stands as a rejection of the conclusions of Evans-Pritchard.[58] Some of these ethnocentric prisms often enter into the controversy over the distinction between customs and laws. Underlying, therefore, the separability thesis with respect to law and customs is an ethnocentric attitude.

It is in this sense that we must understand Paul Bohannan's description of customs as "norms or rules (more or less strict, and with greater or less support of moral, ethical, or even physical coercion) about ways in which people must behave if social institutions are to perform their tasks and society is to endure."[59] In relation to law, Bohannan posits that law is a restated custom.[60] The basis of obligation towards them and their acceptance altogether, according to S. Diamond, consists in the fact that they are "intimately intertwined with a vast living network of interrelations, arranged in a meticulous and ordered manner."[61]

2.3.3 LEGAL POSITIVISM AND THE SEPERATION THESIS

The jurisprudence of positivism is an endorsement of a thesis of separation. As a matter of fact, positivists' separability thesis is about the most popular, although not the most important, in jurisprudential reflection and thinking. What the thesis amounts to, in semantic terms, is one jurisprudential worry that begs for serious

[58] Malinowski, *Crime and Custom in Savage Society*, 1926, p. 14.
[59] Bohannan, P "Differing Realms of the Law" (1965) 67 *American Anthropologist*, No. 6, Part II 33.

intellectual clarification and analysis. Sometimes, one is inclined to posit that the implication of this thesis enters into our interpretation of other important separability thesis in jurisprudence as described above.

For example, one could ask whether it is moral to endorse a kind of separation between women and men and thus between the public sphere and the private sphere. At other times, it is incumbent to ask whether such kinds of separation thesis should enter into the formulation and the origin of law. The fact, however, is that, according to feminists, it does. Once this is acknowledged, it then follows that the kind of conclusions we arrive at on the separation between law and morality, as emphasised by positivists, definitely will be important in our reflective understanding of the nature of law and its relation to justice.

The separability thesis, as advanced by legal positivists, refers to the idea that law and morality are not necessarily connected.[62] 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. Consequently, it is a mark of intellectual bravery to contend

---

[60] Bohannan, P (note 15 above) 33.

[61] Radin, P (1953) *The World of Primitive Man* New York: Grove Press Publication 223.

[62] 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. In this work, attention is paid on both thesis especially as it relevantly relates to the distinction between exclusivism and inclusivism. This shall be treated in the course of the work. 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

that the basic thesis underlying the natural law theorist's insistence on the inseparability thesis is also informed by its postulations on the nature of law. The question then is what is the meaning of this contention? What could it possibly not mean? The significance of this dispute in jurisprudence is important. Part of the significance consists in the fact that in its understanding rests some very important clues to establishing the nature and status of law to man's political and social existence.

But the importance has been dulled by the many incredible instances of straw men constructed either in its defence or, particularly, in its attack. Sometimes, the problem over the meaning of the positions stems from some sort of ambiguity projected even by its defendants and proponents. According to James Morauta, "the separation thesis is sometimes described as the claim that there are no "necessary connections" between law and morality. Unfortunately, that could mean almost anything. Moreover, on some interpretations the claim is clearly false, and one that no sensible legal positivist should accept. I think legal philosophers should jettison this confusing talk of "necessary connections", and focus instead on more specific and carefully formulated claims about the relations between law and morality."[63]

While accepting some of the nuances and intellectual smartness in Morauta's observation, we are inclined to posit that if there are many interpretations and misinterpretations of the separation thesis, it may be because positivists themselves have been engaged either in rhetorical ambiguities over the issue or endless revisionism which has sometimes put the positivists' position over the exact meaning of the thesis in doubt. In fact, even if it is true that some interpretations of the thesis are clearly false, it is the duty of the proponents of the claim to make their position

positivism. Waluchow, W. "The Many Faces of Positivism" *University of Toronto Law Journal*, XLVIII, No. 3, 1998, p. 6.

clear and less pretentious. An ambiguous claim, sometimes, breeds confusion and is subject to some distortions.

But then it is intellectually satisfying to contend that legal positivist's stance on what is regarded as the separability thesis stems basically from its position on the nature of law. Kent Greenawalt, for example, is of the opinion that the social fact thesis is logically prior to the separability thesis. In his view:

> *if one had to settle on a central aspect of legal positivism, as a general approach to legal theory that has existed over time, one would focus on the premise that law is in some important sense a social fact or set of social facts. Suppositions about the connections between law and morality and about the nature of judicial decisions follow from that*[64].

In the same vein, Stanley L. Paulson claims that "classical legal positivism rests on two fundamental doctrines, the command doctrine and the doctrine of absolute sovereignty."[65] This means that whatever position is taken concerning the nature of law will, perforce, influence the position maintained on the connections between law and morality. Since it is already established that legal positivists hold different views concerning law as social facts thesis, from which the separability thesis is inferred, it is implied that the basis for the separability thesis from one legal positivist to another will likely be different. What we are set out to do in the analysis of legal positivism and the separability thesis is pay very close and careful attention on some selected legal positivists and their respective positions on the separability thesis.

---

[63] James Morauta, "Three Separation Theses" in *Law and Philosophy*, 23, 2004, p. 113.
[64] Greenawalt, Kent. "Too Thin and Too Rich: Distinguishing Features of Legal Positivism", in Robert P. George (ed.), The Anatomy of Law: Essays on Legal Positivism, (Oxford: Clarendon Press, 1996). Pp. 1 - 29, at p.19
[65] Paulson, Stanley L. " Classical Legal Positivism at Nuremberg", Philosophy and Public Affairs, vol. 4, no. 2 (Winter, 1975); p.134.

2.3.3.1 THOMAS HOBBES AND THE SEPARABILITY THESIS

Historically, positivism as an approach in social and political philosophy is associated with the works of Thomas Hobbes although his impact in the generation of what is regarded as contemporary legal positivism is indirect and diffused. In actual fact, Bentham and Austin's imperativism can certainly be traced to the works of Thomas Hobbes. The positivism of Hobbes consists in the proposition that the only source of law is the will of the sovereign. Of equal worth also is the view that, according to Hobbes, where there is no such sovereign, there is no law.[66]

If we measure the worth of Hobbes legal theory in terms of its age, it may serve as a rich and fertile source for the understanding of law but if considered in its relation to the totality of the universe, then, it incorporates several limitations and conceptual difficulties. The nature of law is so diffused that it is both practically and conceptually impossible that the source of law is one-dimensional. If we accept Hobbes description of law, then it is incumbent on us to cut off other types of law such as international law between states since they do not have a common sovereign.

Besides, customary laws as part of the growth and evolution of a people's culture and enforceable rules in terms of the dynamics pertaining to that society will be ruled out. And what is more, since Hobbes philosophy was influenced by the socio-political conditions prevalent in England, it stands to reason that the English conditions may not really be used to establish a universal yardstick for the proper understanding of the nature of law. But then, who is the sovereign and what role does the sovereign play in the understanding of Hobbes' positivism? Only a careful analysis of the background to Hobbes' sovereign can help us decipher the positivistic flavour ingrained in Hobbes' political philosophy. It is not enough hailing Hobbes for his

[66] Hobbes, Thomas "Leviathan" in *The English Philosophers from Bacon to Mill*, edited by Edwin Burtt, New York: Random House, Inc., 1939, p. 162.

positivism for a careful study of Hobbes seem to project a philosophy that combines excellently a kind of sympathetic feelings and attitudes towards naturalism while still maintaining the ethos of positivism.

The background to the idea of the sovereign can be read in the light of the severe limitations of naturalism as a legal charter particularly in the state of nature. For Hobbes, natural laws as guides for reasonable conduct in a state of nature without a common power or ruler is impotent considering the fact that man's natural passions are given to pride, partiality, revenge. Thus, naturally, the state of nature is a state of lawlessness but not in terms of the absence of laws but in terms of the absence of a common power to enforce them. From this point of view, it is clear that, according to Hobbes, the most important feature of a law is in its enforceability. Reductively, naturalism is an incomplete legal concept since it is lacking in the ability of being enforced.

But then if this conception is right, there are bound to be certain problems. A fundamental instance has to do with the notion of obligation. Obligation to law based on enforceability of laws of the sovereign places a kind of conceptual limitation on what the terms and nature of obligation are. But one question of urgent importance can be raised here: is the state of nature an inherently lawless state because of the absence of a common, central power or only so in terms of attitude to the law. If Hobbes' reasoning is that what determines whether a society is in a state of nature is in the presence or absence of a sovereign (Hobbes himself said it), then a rethinking is needed because even in developing states where a sovereign or common power is identifiable, attitudes in that polity can still speak of lawlessness, the existence of the central power not withstanding. As argued elsewhere, political life in some countries, even with the presence of the State or sovereign, speaks of the prevalence of the

perversions of the state of nature.[67] Attitudes determine what the state of nature is, not the absence or presence of a common power. In other words, lawlessness is attitudinal, not necessarily institutionally inclined or determined.

One clever objection could be that we cannot make sense, historically, of a state of nature that never existed. Granted this postulate, we can likewise reason that the state of nature is a hypothetical description and abstraction of the evolution and development of the modern state and the idea of law. According to Sabine, Hobbes' political writings were inspired by the civil wars in England and were intended to exert influence upon the side of the king.[68] This evolution is summed up in the emergence of a sovereign through the collective common interests of all members of that political society called a social compact or covenant.

The covenant is the basis for mutual trust which every society depends on and which every individual agrees to. According to Hobbes, everyone is found saying that "I authorize and give up my right of governing myself, to this man, or to this assembly of men, on the condition, that thou give up thy right to him, and authorize all his actions in like manner..."[69] The salience of social covenant in most modern societies through, for instances, elections, constitutional conferences, dialogues etc lend credence to the intellectual and conceptual import of Hobbes' political philosophy as framed in the state of nature saga.

Essentially, therefore, even though Hobbes, in the *Leviathan* recognises and admits the presence of laws of nature, his positivism consists in the fact that the sovereign, who could be an individual or a group, makes laws and acts arbitrarily even

---

[67] Idowu, W. "Citizenship, Alienation and Conflict in Nigeria" in *Africa Development*, Vol. XXIV, Nos. 1 & 2, 1999, pp. 50-51.
[68] Sabine, G. H. and Thorson, T. L. *A History of Political Theory*, 4th Edition, New Delhi: Oxford and IBH Publishing Co. PVT. Ltd., 1973, p. 422.
[69] Hobbes, Thomas "Leviathan" in *The English Philosophers from Bacon to Mill*, edited by Edwin Burtt, New York: Random House, Inc., 1939, p. 177.

though his arbitrariness has its own limits. Since the state of nature was very important in Hobbes' political philosophy, some scholars are of the view that what the state of nature did was only to provide a kind of justifying framework for Hobbes' utilitarianism.[70] But this kind of expressivism is an unnecessary projection of excessivism. Must we build every human society on a kind of Hobbesian excessivism before we understand the dynamics of power?

For Hobbes' the sovereign is naturally and necessarily tuned towards a particular goal in the polity, that of maintenance of peace and security. Thus, even though the sovereign could be arbitrary,[71] acting, as it were, in the light of the common decisions of all, nevertheless, his laws are purpose-oriented. One of the purposes of law, according to Hobbes, is to secure justice. In his words, "where there is no common power, there is no law; where no law, no injustice."[72] Hobbes' attempt is to establish a kind of identity between sovereignty, law and justice. This can sound curious, for sometimes, it does not really follow. In fact, at many points in the history of legal administration, law may end up being an instrument of injustice.

But if Hobbes' analysis is correct, does it then suggest that there was some sort of abandonment of positivism in Hobbes' philosophy? In one instance, it can be said that the development of considerable details of laws of nature in Hobbes' philosophy are attempts to moderate his positivism, not negate it. But to hold unto this position would create a kind of paradox for Hobbes' philosophy of law. This is true because, apart from the fact that laws are teleologically framed, the presence of laws of nature as rules of prudence in the commonwealth are insights which the human mind garners

[70] See Carl Friedrich, op. cit. p. 87.
[71] For Thomas Hobbes, the sovereign is to be accorded absolute power. This is necessary to make the covenant effective and worthwhile. In his words, "covenants, without the sword, are but words, and of no strength to secure a man at all...the bonds of words are too weak to bridle men's ambition, avarice, anger, and other passions, without the fear of some coercive power." See Hobbes, Thomas "Leviathan" in *The English Philosophers from Bacon to Mill*, 1939, pp. 174, 167.
[72] Ibid., chap. XIII, p. 162.

from the nature of things in the universe and which are necessary components in the structuring of the commonwealth instituted. Reflectively, this has to do with the idea of self-interest which is a natural inclination in everyone.

One conclusion from Hobbes' political philosophy would then be that here stands a doctrine of positivism which is based on the idea of absolute sovereignty but which is moderated and tempered by a set of prudential rules ingrained in the natural order of things and which moderates the actions and decisions of the sovereign. There is a striking passage illustrating this: "for whatsoever men are to take knowledge of for law not upon other men's words, but everyone from his own reason, must be such as is agreeable to the reason of all men; which no Law can be but the Law of Nature."[73]

A contemporary legal positivist is likely to see the endless number of contradictions in Hobbes' positivism and thus submit that Hobbes' political philosophy is not an excellent candidate of modern positivism. One other conclusion could be that even though we cannot deny that Hobbes' legal philosophy was essentially positivist in outlook, considering his repeated insistence that "law is a command", in other words, that "law, properly, is the word of him that by right hath command over others,"[74] it behoves us to contend that Hobbes, however, did not infer that law and morality, in the senses portrayed above, are separable. Hobbes' positivism is maintained in the contention that law, properly called, is the command of the sovereign but was insistent on justifying the claim that law cannot be divorced from its drive towards justice. The basis of law, *ab initio,* according to Hobbes, as it relates to the commonwealth, is to secure justice.

[73] Hobbes, Thomas "Leviathan" in *The English Philosophers from Bacon to Mill*, edited by Edwin Burtt, New York: Random House, Inc., 1939.
[74] Ibid., p. 174.

The point is that even if Hobbes did not say this in actual terms, it can be inferred. To pose a limit to the command of the sovereign in the light of the laws of nature or the ideals of justice, as Hobbes did, is to present Hobbesian positivism on a pedestal that is not too congruent with modern positivism. Thus, on the one hand is the descriptive thesis of Hobbes positivism and, on the other hand, is the evaluative, normative thesis, a logical fallout of that entire philosophy. While modern positivism rejects the verbiage and limit of naturalism in its insistence on the separability thesis, it is certainly not a misnomer to contend that Hobbes not only denied the separation but also celebrated its denial. For Hobbes, any distinction between law and morals is to engender confusion in as much as each society has only one voice with which it can speak and one will which it can enforce, that of the sovereign who makes it a society. Hobbes' jurisprudence thus unites both law and morality in the hands of the sovereign.

Given the fact that the sword and crosier are united in the hand of the sovereign, one very fundamental implication is that all social and political authorities are concentrated in the sovereign. Thus, social conventions, ethos and mores are reducible to his will. Such a reductionism is not just historically false but equally conceptually limiting. But then, law is what the sovereign decrees. In this kind of situation, it is to be expected that law and morals are merely the will of the sovereign. Thus, to assert an independent existence of morals and laws will be to create a division in the understanding of the power of the sovereign. One justification for this is that, for Hobbes, there is equally no distinction between the state and the society. Such a distinction will create the possibility of a return to the state of war and self destruction which the commonwealth was meant to correct. But then what of states, such as the American Federation, or the Nigerian state, where the necessity of a common wealth was not informed by a state of nature? Besides, state of nature may

not be entirely described in the destructive sense in which Hobbes described it. Thus, one could constate that Hobbes' scientific and logical materialism will have to break down, and indeed, broke down.

In this kind of jurisprudence, an endorsement of the separability thesis will not be strong enough to support the absolutism that Hobbes packed into the nature of the sovereign power in a political society. If we understand Hobbes very well, it can be deduced that in his logical analysis, there is no place for sources of command or rule other than what issues from the sovereign To this end, Hobbes kind of sovereignty is an absolute one which does not create a choice except one between absolute power and complete anarchy. Thus, Hobbes' absolutism conflates and collapses the distinction between law and morality. Thus, Hobbes' absolutism is a rejection of the thesis of separation since though morality does not pose a constraint on the power of the sovereign, it is part of the will of the sovereign, given Hobbes' design and construct.

In fact, from Hobbes' obsession with the role of the sovereign, it can be said that law and morality are not distinguishable in the sense in which modern positivists differentiate them in as much as they both issue from the absolute, sovereign ruler. Thus, the separability thesis is one thing to Hobbes, while it is another thing to later generations of positivists after Hobbes. This is buttressed in the excerpts below:

> *For Hobbes, the law is justified because it alone can guarantee everyone's well-being so that each can pursue his/her interests in ways that do not interfere with others. In other words, the difference between law and morality is really between a 'higher' (public) morality, which involves obeying the sovereign, and a 'lower' (private) morality, which involves pursuing self-interest (which Hobbes equates with conscience). This means that positive law was designed to be a replacement of natural law, since it would largely serve the same functions. This is why Hobbes was vilified by religious leaders in his day...*[75]

[75] *Social Theory of Law*, http://www.warwick.ac.uk/~sysdt/stl2003-5.htm.

The import of the above is revealing. What it suggests, in the first instance, is that law, in Hobbes' estimation serves a dual role - a social and moral role. The justification for the social role of law consists in the fact that it explains the necessity of law as emanating to solve and handle a social problem. One of the moral roles of law, according to Hobbes as pictured above, consists in the sense that it defines the limit to each person's actions within that respective society. In the second instance, Hobbes distinction between law and morality is hierarchical not conceptual. In other words, the difference between law and morality can be determined by establishing which is higher in terms of effectiveness. Law is congruent with morality, although, according to Hobbes, it is higher. Even in this sense, the congruency is equally established by the fact that law replaces and takes over from morality. The implication is that both serve, in a limited sense, the same function - ordering and regulating men's self-interests.

In another perspective, though not too obvious and not often stressed, law is a form of moral charter for defining the nature and consequence of men's self-interest. If law is a public morality, according to Hobbes, and private morality a realm of self-interests, then it follows that both law and morality can indeed help each person in a given society to establish what the nature and limit of our self-interest is. This goes to show that law is not antithetical to morality but helps in furthering it. In this case, there is then, always, a moral dimension to the law. In the final analysis, if Hobbes statement is understood, then it follows that by replacing natural law with positive law, law and morality are not really separable since it is impossible and difficult to assume what is not natural to a thing.

But then, that was Hobbes. For positivists after Hobbes, most especially David Hume, and later generations of positivists such as Herbert Hart, the separability thesis

is essentially a distinction between the 'is' and the 'ought'. This point and observation was argued out in the following:

> *Starting with Herbert Hart, the Hobbesian distinction between law and morality was distorted, so that law/morality came to be seen as analogous with is/ought. This occurs in his critique of John Austin, who holds Hobbes' view. Among the many important consequences of this distortion is that the Hobbesian right to revolution is no longer a part of legal positivism because law is simply treated as a fact, not something based on the rational consent of the governed. Hart treats objections to the law as completely outside the normative range of the law, when in fact people consider their allegiance to the law as a negotiated settlement that may be revoked by appealing to the principles that had to be restrained in order for agreement to be reached in the first place. This is why Hobbes and Austin held that the law had to be backed by sanctions - because people's allegiance is always conditional to the overall achievement of their ends. This reflects two developments, one philosophical and the other political...*[76]

But then, the history of this distinction between Hobbesian and Hartian view on law and morality or what is termed the separability thesis is very important. For Hobbes, according to the quotation above, the distinction between law and morality is not treated in a somewhat scientific manner. What holds for Hobbes with respect to the distinction between law and morality can be deciphered in the view that law is not to be described as a fact but, more importantly, as a rational order which can be equated with the moral order which it replaced. The implication is that in Hobbes positivism, the nature of law is not merely a factually describable entity empty of normative significance: it is a product of rational men acting within rational means to subject themselves to a rational order. It is in this sense that law is a replacement of morality only to the extent that it accomplishes the desired end.

To this end, law is teleological seen from the Hobbesian viewpoint. Thus, if we accept this interpretation of Hobbes view on the nature of law and morality, it behoves us to conclude that the separability thesis as held by modern positivists is distorted at least if we consider the views of its pioneering progenitor. In other words, the attempt to remove law from the realm and confines of morality will sound not only

absurd but equally a misconception. That is if this interpretation of positivism, in the Hobbesian sense, is anything to go by.

The Hartian distortion of the Hobbesian distinction between law and morality, if we accept that thesis, is thus crucial to the perennial ambiguity that is a plague on the understanding of the separability thesis in modern times. The attempt to treat law entirely as a scientific social fact, removed from its status as a rational means for the regulation of human life in given society, we suspect, is bound to be self-stultifying. This self-stultification stems from the excessive inclination to see law as a kind of object which can be studied just as a natural object can be studied. What is denied is not the possibility of studying law as a social phenomenon but that more than that projection, law is a rational enterprise which relates to the manner in which men are governed or are to be governed with in the light of what they consider to be their stake.

To treat law as a fact is not to be factual enough; law emanates from the instinct for survival, order and maintenance of society. The so-called scientific characterisation of law cannot be more authentic and original than its source: law is first a rational principle, the factual is a different stuff entirely. In a fairly long passage, Will Durant seems to capture this distinction between the ascription of a factual character to law and its birth as a rational order. Connecting the origin of law to the state, Durant concludes that law is purposive. In his words:

> *A state which should rely upon force alone would soon fall, for though, men are naturally gullible they are also naturally obstinate, and power, like taxes, succeeds best when it is invisible and indirect. Hence the state, in order to maintain itself, used and forged many instruments of indoctrination - the family, the church, the school - to build in the soul of the citizen a habit of patriotic loyalty and pride...Above all, the ruling minority sought more and more to transform its forcible mastery into a body of law which, while consolidating that mastery, would afford a welcome security and order to the*

[76] *Social Theory of Law*, http://www.warwick.ac.uk/-sysdt/stl2003-5.htm.

people, and would recognize the rights of the "subject" sufficiently to win his acceptance of the law and his adherence to the State.[77]

The philosophical importance of this first observation on positivists' separability thesis is the fact that it made it possible to read many confusions and ambiguities into the canons of legal positivism and its emphatic vetoes on what the separability thesis actually is. More significant also is the consideration that, if positivism is open to these differing tendencies in the understanding of what the separability thesis is, it may follow that the scientific status of law or nature of law it claims to be able to provide in human society may not really be scientific in the actual and ultimate sense.

It may then turn out to be the case that legal positivism has actually found it difficult to establish, and by that, elaborate and elucidate on what a true scientific nature of law is. Or, in the alternative, it may follow from this confusions over what is clearly attributed a scientific status, that law is not subject to a truly scientific character and characterization. Both possibilities are made feasible for discussion in the light of the many interpretations and understanding of what positivists' separability thesis means for the owners of the doctrine and thesis. But then, this is by no means conclusive. More thorough analyses of other accounts of the separability thesis are needed.

2.3.3.2 DAVID HUME AND THE SEPERABILITY THESIS

According to Carl Friedrich, while Hobbes retained the verbiage of natural law, David Hume worked and wrote out its destruction.[78] As a matter of fact, Hume's importance for positivism consisted in the provision of the intellectual template for the clarification of the separability thesis. Hume offered devastating criticism of

[77] Durant, W. *Our Oriental Heritage*, p. 25.
[78] Friedrich, op. cit., p. 91.

natural law theory by recourse to the tenets of true empiricism. According to Hume, the validity of normative rules cannot be logically derived from objective fact since they are basically subjective to individual interpretation.

As a matter of fact, Hume argued that a normative statement could not be inferred from a purely factual one. There is, he claims, an unbridgeable gap between "ought" and "is." This is what Hume regarded as the fallacy of deriving "ought" from "is."[79]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 ascertainability and validity without recourse to subjective considerations. Thus, for Hume, morals are to be distinguished and held separate from positive laws. The insistence on the separability thesis appears to be the necessary condition for a scientific account of positive laws.

As a qualifier, however, Humean semantics incorporated the idea of natural law[80] but this incorporation was done in favour of positivism. According to Hume, in all times and places, man possesses certain common traits which can be rendered as fundamental laws of human nature. These, according to Hume, are: "the stability of possession, its transference by consent, and the performance of promises."[81] For Hume, these rules are not sourced in reason; reason only recognises their utility to human life, it does not explain their origin. Their origin and invention is rooted in man.

Following the trail of Hobbes' positivism, Humean positivism was also an attempt to study society scientifically. However, there are many observable

[79] David Hume, *Enquiry Concerning the Principles of Morals*, chp. 5

[80] Some scholars, such as Forbes, are very prone to contend that while it is true Hume argued against the scientific validity of a creed of natural law, in actual fact, Hume reworked a modern theory of natural law in which the fundamental principles of naturalism are based on an empirical science. D. Forbes, *Hume's Philosophical Studies*, chap. 2. in the same vein, Freeman contends that Hume's efforts in this direction was purely secular in that he founded a science of morality and law in a science of man which had no need of a religious hypothesis to justify. See Freeman, *op. cit.*, p. 111.

differences between Humean positivism and Hobbesian positivism. The first consists in the place both accord the role of reason in relation to the laws of nature. For Hobbes, justice exists as part of the insights grounded in human nature which can be discovered through reason. What human laws, arising from the social compact, do is to assist in the achievement of such natural justice.

For Hume, justice is neither a natural virtue nor is it interred in reason. For Hume, justice is to be pruned of its universal or superior meaning since it is entirely artificial and of human invention.[82] In his words,

> *Having found that natural as well as civil justice derives from human conventions, we shall quickly perceive how fruitless it is to resolve the one into the other, and seek, in the laws of nature, a stronger foundation for our political duties than interest, and human conventions; while the laws themselves are built on the very same foundation.*[83]

In the second place, while Hobbes regarded as sacrosanct the origin of political society to consist in the prior existence of a state of nature, the horror and terror which incline men to the ideals of justice through the formation of a social contract, Hume sees the grounding of justice in the idea of a state of nature as pure philosophical fiction. Thirdly, Hume tended to have concluded that laws of nature are really not universal and absolute in the sense in which it was peddled in popular juristic thinking; for Hume such laws are human inventions. Thus they are part of the origin of human political society. This is different for Hobbes who sees laws of nature as existing before the formation of political societies. Last, but not the least, as a critique, while the concept of sovereign enjoys an unending appeal for Hobbesian philosophy of law, Hume's analysis is deficient in a thoroughgoing account of the role of the sovereign, in a juridical sense, in the explanation and interpretation of the origin of law and their connection to the ideals of justice.

---

[81] Hume, D. *A Treatise on Human Nature*, (1739-40), Book III, Part I, Section 6.
[82] David Hume, *Treatise on Human Nature*, Bk. III, Pt. II, Sect. VIII, pp. 542.

The best place to start then is in the Humean notion that the original motive for the establishment of justice is not self-interest *per se*, not even a natural inclination. According to Hume, no natural inclination to be just is observable in man. It consists in what he calls 'public interest'. In his words, "self-interest is the original motive to the establishment of justice, but a sympathy with public interests is the source of the moral approbation which attends that virtue."[84]

A critical assessment of this statement shows that Hume's logic or science of human nature is not as smooth as it seems. By grounding the establishment of justice on the notion of public interests, Hume overestimated the motive that unites a particular political society and, worse still in the important sense, underestimated the motives and potential disruptive factors which often lull societies into a state of moral complacency. A little reflection below will show the grounds for this claim.

The question is whose public interests are being defined here - class, religious, ethnic, gender, military? Lenin must have been appalled by Hume's 'innocent' celebration and recourse to the idea of justice as founded on public interests when he exclaimed that "people will always be the foolish victims of deception in politics until they learn to seek out the interest of some class or other behind all moral, religious and political pronouncements."[85] Or what do we also make of the class conception of public interest as captioned and captured in the following:

> *It must be realised now and for all time that this articulate minority are destined to rule the country. It is their heritage. It is they who must be trained in the art of government so as to enable them to take over complete control of the affairs of their country. Their regime may be delayed, but it cannot be precluded.*[86]

Again, how does the idea of public interests square up with ceaseless contentions between minority groups and majority groups over the sharing of public

---

[83] Ibid., pp. 542-543.
[84] Hume, D. *Treatise on Human Nature*, quoted in Carl Friedrich, op. cit., p. 92.

(national) resources and its connections to the ideals of justice? If we take the case of the Niger Delta in Nigeria, for example, what is meant by public interests becomes a worrisome issue. The conception of what public interests are between the minority groups in the Delta region and the majority groups in the country is not only controversial but also problematic.

As it has been relevantly observed, packed in the experiences of the Niger Deltans is the issue of social, political and economic exclusion. In short, the lingering conflict in the Niger Delta is the battle not only to resist the alienating tendencies of the Nigerian state but also, the battle to realise the rights and privileges of citizenship. While in most cases the struggle in the Niger Delta is presented as one of self-determination of an ethnic group, taken to dramatic heights by the Ogoni debacle, within the context of the structurally imbalance Nigerian federation in which the majority ethnic groups control oil resources found in minority areas, the site of conflict has remained within the dialectics of oil production, distribution and access.[87] While injustices continue to be perpetrated in these regions, a curious conception of public interests and common good seem to be invoked in grounding the deleterious conditions under which Nigerian citizens in that region are living.

The implication is that members of a particular society do feel a sense of common interests and are ready to accept a sense of obligation generated by that common interest. Thus, for Hume, justice is not based on reason in as much as values are based on human propensities to action. To this end, reason by itself cannot give rise to obligation. The force of obligation in such cases is dependent on whether those

---

[85] Lenin, Vladmir quoted in "Towards a New Beginning" *The Guardian*, November 4, 1993, p. 23.
[86] Awolowo, Obafemi *Path to Nigerian Freedom*, London: Faber and Faber, 1947, p. 63.
[87] Idowu William, "Citizenship Questions and Environmental Crisis in Niger Delta: A Critical Reflection" in *Nordic Journal of African Studies*, Vol. 11, No. 3, pp. 377-392 at pp. 378-388.

actions and propensities which give rise to such obligation in the first instance are accepted or not.

So far, it appears what Hume had been concerned with all along is the unravelling of the 'myth', in terms of the science of human nature, around which the doctrine of natural law is ensconced. What is pertinent is how this accounts for the idea of positive laws, for if Hume's scientific ethics is true, then the question is whether this scientific explanation in terms of the general convenience and men's estimate of utility also grounds successfully why they are favourably disposed or ill disposed to laws in general.

Men's attitude to positive human laws, in general, like the bad man of Holmes is wanting in terms of what Hume calls general convenience and men's estimate of utility. Besides, Hume's radical version of empirical positivism though tight in its logic and conclusions, will still need to be assessed in the light of basic experiences of societies where the validity of laws and ethical standards transcends the realm of logic painted in Hume's' empiricism. Thus, for instance, if one of the tenets of German Romanticism were true then Hume's task and logic cannot be described as finished talk less of being conclusive.

The history of specific nations as clustered and engaged in the existence of a cosmic spirit underlying all values of social life in terms of morals, art, cultural achievements will still have to be accounted for. A science of human nature as conceived by Hume may not be a sufficient ground to denounce such history since they transcend what Hume calls men's estimate of utility. In fact, men's estimate of utility and the idea of general convenience of members of the society may not adequately establish the uniqueness or distinctiveness of not just cultures but people in general.

And what is more, in relative terms, if it is the case that Hume's attempt to ground ethics in a science of human nature is sound and logical, although wanting in terms of the valid and cogent experiences of the history of nations, taken in atomic terms, it stands to reason that a metaphysical abstraction attenuates the reasoning of Hume. In other words, Hume's scientific programme could turn out to be a metaphysical construct since it elevates human interests and the notion of utility to a metaphysical ideal.

If the premises of Hume's argument are sound, what then will be his account of the nature of laws and the relation between law and morality? For Hume, human positive laws are created arising from certain absences in man's attitude towards the goal of justice and equity. These absences are: the absence of sufficient sagacious perception and the absence of sufficient strength in the human mind. If these had been present, there would have been no need for government and political society.

These absences, for Hume, incline men towards the need for law. Therefore, human laws and the obligation towards them, according to Hume, derive and draw their validity not from a rationally perceived system of ideals drawn from the nature of things or from any religious hypothesis since, according to Hume, such do not exist, but from the idea of utility: a firm emotional basis. In his words, "it follows that everything which contributes to the happiness of society, recommends itself directly to our approbation and good-will."[88]

If utility is the ground for the high regard that man pays for virtues such as justice, and the pivot of our moral decisions, how does this explain the relationship between law and morality? Can we then say that morality and law are inseparable, if both are seen as involved in the satiation of human interests and general convenience? If it is true in Humean terms that human laws are founded on the concept of utility,

and it is equally true in Humean terms that the foundation of the chief part of morals is the concept of utility, does it not follow that utility necessarily endorses an inseparation between law and morals?

The standard statement of Hume concerning the relationship between law and morality consists in the fact that we cannot deduce statements of obligation from statements of fact. In other words, it means that we cannot derive the 'ought' from the 'is'. As a matter of fact, Hume's distinction between the 'ought of law' and the 'is of law,' in a general sense, served as the foundation of legal positivists' insistence on the separability thesis, the contention that laws and morals are necessarily separated. But then, if we are to accept what is meant here, it appears very true that a qualifier will be needed to understand Hume's notorious distinction. Our persuasion is that when Hume condemned the fact that the 'ought' cannot be derived from the 'is', what he was denying is the foundation of morality sourced in a religious hypothesis such as what the will of God is or some other absolute ideal or standards. It was this denial, quite in line with his scepticism, that makes it impossible to affirm that law and morality are necessarily connected.

But if Hume's empirical version of a science of morals is anything to go by, particularly as based and rooted in the idea of utility, it seems very obvious to us, that Hume's inevitable conclusion will be that law and morals, considering this empirical framework, are connected necessarily since both are sourced and informed by the ideas of utility. But the weakness of the position of Hume is that if utility is the overall principle towards which every moral decisions and the legal order are driven, the idea of utility itself is subject to a variety of philosophical positions.[89] The question is to determine what concept of utility Hume projected. This is what has been highlighted

[88] Hume, D. *An Enquiry Concerning the Principles of Morals*, (1777), 263.
[89] Carl Friedrich, op. cit., p. 93.

so far, and the obvious conclusion is that from that analysis of utility, Hume established a radical separation between fact and value. For Hume what most philosophers such as Hobbes called higher reason involved in value judgments is nothing but a general and calm passion.

The assimilation of value judgements, Hume contended, can be achieved if our system of ethics is based and built on facts and observation. From this standpoint, it will be less difficult to see that our systems of laws and ethics and the facts on which the value judgements which underlie them are based are nothing but human conventions. What then are conventions? What are the determinants of conventions in plural, federal or multiethnic societies, for instance? What is the difference between constitutionalism and conventionalism?

Sometimes, a convention can be defined in the constitutional sense as "an informal and uncodified procedural agreement that is followed by the institutions of a state." In these states, the actual distribution of power may be markedly different from those which are described in the formal constitutional documents.[90] The term may also refer to a set of widely agreed or accepted rules or customs. In a social context, a convention may retain the character of an "unwritten" law of custom. In this social context, conventions may refer to a set of articulate ideologies either written or otherwise that are invoked to justify a course of action within a political society. It could be defined by all or particular sections of that political society. In Humean language, conventions can be described as validating habits founded on utility.

It is our submission that conventions are not necessarily salutary concepts or ideologies in grounding the ideas and ideals of justice. This is because certain conventions depending on the conceptions can be adopted to justify domination,

marginalisation or oppression. If we take the experience of the Nigerian political society as a case in point, it will at once be clear that conventions cannot and have not been helpful in grounding the ideals of justice in Nigeria. Rather some sections of the country have often adopted conventions as ideologies to dominate and continue to rule the rest of the country. This ideology has, in turn, been legitimated by certain materials for the theology of domination. Such materials for the theology of domination can be validated in the statements credited to Malam Maitama Sule:

> *Everyone has a gift from God. The Northerners are endowed by God with leadership qualities. The Yoruba man knows how to earn a living and has diplomatic qualities. The Igbo is gifted in commerce, trade and technological innovation. This is no doubt the material for the theology of domination*[91].

In relation to citizenship in Nigeria, it has been argued that "when once the basic aspect of the status of citizenship in Nigeria is carefully examined, it establishes a worrisome conflict between the demands of/for constitutionalism and the restrictions of conventions and culture."[92]

Again, in terms of appeal to conventions, one is bound to suspect a kind of circular reasoning in Hume's scepticism. Once scepticism is adopted, it finds its justification in a conceptual absurdity or difficulty. One of such conceptual difficulty may be the circularity of the arguments adopted. This observation can be spelt out in the following: ethics is based on facts and observation, the facts underlying ethical value judgements are conventions which receive their validity from habits and habits are traceable to utility. What then is utility based on? Of course, utility is the collection or aggregation of human interests forming the public good which men aspire towards. From this point, it appears the answers become an open affair which is subject to many interpretations. George Sabine rightly observed that "if the premises

---

[90] From Wikipedia, the free encyclopedia, http://en.wikipedia.org/wiki, 2005.
[91] Sule, Maitama "Why the North Leads." Excerpts from the translated version of Maitama Sule's Address of the launching of Isa Keita (ed) *Power and Knowledge*, on December 22, 1922.

of Hume's argument be granted, it can hardly be denied that he made a clean sweep of the whole rational philosophy of natural right, of self-evident truths, and of the laws of eternal and immutable morality."[93] But the case is that Hume's scepticism concerning the eternal validity of morals and ethics and religion, based on a thoroughgoing empirical positivism had the paradoxical effect of producing an elaborate metaphysics, a religious revival and a firmer belief in absolute ethical values even during his time. It could thus be argued that Hume's empiricism and destructive analysis of an absolute system of ethics was, perhaps, lacking in the idea of utility which he spoke of. Or we could even contend that Hume's arguments may be described as anti-social since it has that inherent possibility of leading or ushering our minds into a state of moral complacency. The implication of Hume's concept of utility and positivism with respect to jurisprudence was adequately spelt out by Jeremy Bentham whose treatment on the relationship between law and morality constitutes the subject our next inquiry.

2.3.3.3 JEREMY BENTHAM AND THE SEPERABILITY THESIS

In general, Bentham's work on the separability thesis has two sides that need to be understood. These are the analytical frame which is based on law 'as it is' and the teleological frame based on the purpose, ends and goals which law 'ought' to pursue. According to W. G. Paton, the disaster for English jurisprudence consisted in the fact that Bentham's work was not taken in its entirety. In this regard, it is to be noted that analysis without a keen view of social policy is barren, while a study of the objectives of law is useless unless founded on an analytical appreciation of the existing law.

---

[92] Idowu William, "Nigerian Citizenship, Gender and the Politics of Identity: The Conflict between Constitutionalism and Conventionalism" in *Brainfield Law Journal*, Vol. 1, No 2, 2004, p. 133.
[93] George Sabine, *A History of Political Theory*, revised edition, 1954, p. 608.

While it is true that Hume did not develop a comprehensive theory or philosophy of law, his obsession with the concept of utility as the basis for demystifying the absolute idealistic nature of morality sourced in the idea of natural law turned out to be the Benthamite formula for erecting the foundation of positive jurisprudence. Again, while it is true that Hume's empirical positivism enjoyed backing in the contention that morality is based on human convention, validated by habit and traceable to utility, Bentham's empirical positivism was grounded, primarily, in the idea of sovereignty. In trenchant terms, Bentham's construction of an experimental jurisprudence was achieved by an epigrammatic combination of both Hobbesian sovereignty and Humean utilitarian principle.

Bentham's positivist jurisprudence can be described as an attempt to build the science of law on the "logic of the will." Thus, law is defined in terms of what is interpretable in the notion of the human will, not a transcendental will. This will, for Bentham, finds its apt expression in the idea of sovereignty. What then is the significance of the notion of sovereignty for Bentham? How does that concept explain the connection between law and morality? Is the separability thesis entailed in the notion of law as the logic of the will?

From a rudimentary reading, it appears the science of law that Bentham and Hume were trying to build was not bound to succeed, at least in some sense. It is very clear that, though it may not have been obvious to Bentham and Hume, that the kind of science of human behaviour and actions constructed in the light of common interest or good is, in a significant way, if not in many ways, an idealistic construct which is most typical of some metaphysical allusions, inferences and arguments. For example, according to Bentham, "the art of politics consists in governing individuals through their own interests, in creating artifices of such a kind that in spite of their avarice

and ambition they shall cooperate for the public good."[94] Carefully then, one can constate that the idea of the public good is removed from the realm of individualism and is elevated to a transcendental universalism, which is aspiratory in a sense. The notion of equality of all men which he derided in the doctrine of natural law was resorted to in grounding and justifying the philosophical basis of his principle of utility when he said that "one man is worth just the same as another man."[95] If this view is accepted, it almost explains why it is the case that though Bentham worked relentlessly for a comprehensive legal reform, the outcome of the campaign was not a success as that of the logic of his empirical positivism. We are thus compelled to agree with George Sabine that the connotations of Bentham's jurisprudence made social legislation difficult.[96]

The logic of the will, as advocated by Bentham, has to be understood in relation to the idea of an all-powerful sovereign. The question that arises here is 'against what is Bentham's science of law to be judged or assessed?' The possible answers that offer themselves are the idea of sovereignty and the idea of the inclination towards public good (utility). Alternatively, should both answers be taken together? Bentham's notion of sovereignty or the logic of the will was aptly treated for modern understanding by his disciple, John Austin. In this sense, it shall serve us well if the notion of sovereignty, though developed by Bentham, but popularised for jurisprudential analysis, be provided in the Austinian sense. In this sense, endless and obvious repetitions shall be avoided.

However, a few preliminary comments on the notion of the will and command are necessary. If the human will has any logic, then it is traceable to the notion of

[94] Bentham, J. *A Fragment on Government*, edited by Wilfrid Harrison. Oxford: Basil Blackwell, 1948, the Preface.
[95] Quoted in George Sabine, *A History of Political Theory*, revised edition, 1954, p. 621.
[96] Sabine, G. *op. cit.*, p. 621.

command. It can be said that the nature of a command is not given to at least one of the laws of logic. The law of excluded middle states that a proposition is either true or false, but not both, for it to be logical and descriptive of the world. If interpreted rightly, a command is not an assertion since it is neither true nor false. Thus, in terms of this law, a command is neither analytical nor empirically informative. Thus, to construct the science of law on what is based on the command theory is to establish a curious science since commands are not assertions. In other words, commands do not describe nor capture any state of affairs or matter of fact. They are not analytic statements either.

If this analysis is accepted, it then follows that Bentham's recourse to the idea of sovereignty as a clue to the science of law will be found problematic since commands, which are the distinguishing feature of sovereignty, are not assertions since they do not describe a state of affairs in the way in which scientific statements do. Bentham's approach may then be regarded as unsuccessful except there is another sense in which the scientificity of this approach can be understood and interpreted. After all, his rejection of natural law consists in the fact that it was not empirically descriptive.

One way in which this theory can be salvaged is to contend that the command theory only attempts to present law as a product of an authoritative coercive power structure which makes laws enforceable; that is, not in terms of the content of the law, but in terms of the authoritative coercive power which backs it. This affords an independent basis for a rigorous classification of law in terms of the functions of the processes of the authoritative power structure at any given time. This raises the status of the law to that of a closed system, dealing with means rather than ends. These

institutional processes can be the object of study, which in the end, ascribe a scientific status to the nature of law.

Going by this interpretation, the command theory, as envisioned by Bentham, may eventually be found erecting an undemocratic jurisprudence, if law is taken as the property and creation of a free and a democratic people,[97] in as much as coercion and commands deal with the will and not reason, meaning that commands do not logically create room for the provision of justification for an action in the same way an appeal to reason does. The political neutrality engendered by the command theory with respect to democratic values and ethos explains why Bentham's jurisprudential formula advocates a rigid separation between law and morality. The implication is that an inclination towards a separation of law from morals explains why such theories are not sympathetic to democratic principles. If then the present wave of democratisation is to be counted serious in the constitutional and jurisprudential senses for newly developing countries, and also older ones, then it follows that legal theories that are positivistic and inclined towards the command theory of law are to be held as incompatible and unhelpful to these systems.

But then, what is crucial and begging for intellectual clarification is Bentham's analysis of the separability thesis. It is pertinent to note that Bentham's notion of the separability thesis derives not only from his notion of sovereignty, but more particularly from his conception and treatment of the utility principle. Bentham's jurisprudence is an intellectual commitment to the moral theory of David Hume. According to Hume, the conclusions of our reason do not produce or prevent human

[97] I adopt here Jeremy Waldron's conception of democracy in which democracy includes the ideas that rulers are controlled by the people they rule (the people acting, voting and deliberating as equals through elections and representatives), the people determined the basis under which they are governed, and the people choose the goals of public policy, the principles of their associations and the broad content of their laws. See Jeremy Waldron, 2004, "Can there be a Democratic Jurisprudence" http://lawweb.usc.edu/faculty/workshops/documents/Waldron.pdf.

actions. Morality, on its part, produces actions in humans and excites our passions. If this is so, then, it behoves us to conclude, argues Hume, that morality is not based on reason.[98] Since morals are not based on reason, they must be sought elsewhere in human nature.

Based on the Humean conclusion, Bentham's argument has been that law and morality are contingently and not necessarily connected. From this reading, it does not mean, according to Bentham, that law ought not to have a moral content but that a moral content is not a necessary ingredient, prerequisite or property of law.[99] The separability thesis thus consists, according to Bentham, in the proposition that while a law should have a moral content, a moral content is not what defines what a law is or whether a law actually exists. The needlessness of defining law in terms of moral contents is the insistence of the positivists. Implied in this insistence, of course, is the distinction between human laws and natural law. What Bentham affirms is the fact that the province of jurisprudence is the analysis of human positive laws. To this end, human laws need not derive their validity and justification from any moral standard.

According to Hart, Bentham's insistence on the separation of law and morals can be decoded in the view that, in the first place, a subscription to the thesis of separation will help us see the precise issues involved and posed by the existence of morally bad laws. The question is: 'what is Bentham's moral criterion for evaluating bad laws which necessitates the insistence on separation?' Also, are laws in need of separate moral criteria for their assessment apart from their being law? Is goodness or badness of laws

[98] According to J. C. Smith, Hume's argument is deficient in the sense that he adopted a limited definition of reason to mean the discovery of truth or falsehood which applies only to mathematics and the agreement of empirical statements with the world of facts. For Smith, there is abundance of evidence to suggest to us that reason influences human actions in a great deal. See J. C. Smith, *Legal Obligation*, p. 10.

[99] J. C. Smith, *op. cit.*, p. 10.

not self evident? Is separation a sufficient evidence or basis for insightfully discovering the precise issues involved in the existence of morally bad laws?

Clearly, moral criteria are not the only ones for the assessment of laws. Indeed, there are, for example, teleological and pragmatic, even prudential criteria for the assessment of laws. Attention seems to be on moral ones for the simple reason that moral reasons appear to be the bone of contention between naturalists and positivists. Why it is so is a subject of intellectual curiosity but which needs to be examined separately.

The possible answers which offer themselves for discussions on the questions raised above are diverse. However, what is clear in most cases is the view that law is not built on law alone. In an attempt to make laws, certain other items of life such as social polices, public morality, religious orientations and some other facts of societal and public life are brought to bear in its making. These are items that are often brought to bear when laws are to be made and when their assessment is also undertaken. The fact remains that Bentham's positivism is silent on what constitute the basis for adjudging a law as morally bad or good. It is this numbing silence that makes the insistence on separation quite controversial.

Secondly, Bentham's insistence on the need for separation is in aiding our understanding of the specific character of the authority of a legal order. Bentham's carefulness in this direction, i.e. in the separation of law and morals, was anchored on the need to avoid relapsing into two unbidden situations[100], one of anarchism[101] and the

[100] In his *Theory of Legislation*, Bentham wrote, "Here we touch upon one of the most difficult of questions. If the law is not what it ought to be; if it openly combats the principle of utility; ought we to obey it? Ought we to violate it? Ought we to remain neuter between the law which commands an evil, and morality which forbids it? The solution of this question involves considerations both of prudence and benevolence. We ought to consider whether the probable evils of obedience are less or greater than the possible evils of disobedience". See *Theory of Legislation*, New York: Oceana Publications Inc., 1975, p. 39.

[101] According to Bentham, the argument of the anarchist could be this: "this ought not to be the law, therefore, it is not law and I am free not merely to censure but to disregard it"

other of reactionism[102] with the former disregarding what he thinks ought not to be the law while the latter stifles the growth of law through criticism.

Rather than see laws in natural terms, Bentham reduced them to statements of command by the sovereign. In other words, the key concepts of laws are to be found or reduced to the logic of the will rather than that of reason where every human being in a political society is viewed either as commanded or prohibited. Therefore, to have a legal duty is to be a subject of a command or be prohibited in a particular way.[103]

But then, this insistence is not without its critics. Natural law hall of fame is replete with serious challenges against positivists' insistence on the separability thesis. Elegido, for instance, provides a sweeping analysis showing the absurdity of the positivists' claim and insistence. In the words of Elegido,

> *When a jurisprudential question is raised and answered it will commonly happen that the ideas used in the answer will be themselves in need of explanation. If one keeps raising questions in this way and pushing the jurisprudential analysis to its limits, it will be found that the ultimate ideas to which reference has to be made do not belong any more to the domain of "law" but rather to those of ethics or political philosophy. This happens in the analysis of rights, duties, the authority of the law, the identity of a legal system, the duty of a judge in reference to the application of unjust laws, the principles of criminal punishment and in many other similar questions.*[104]

While Elegido's point is not illegitimate here, however, it can be argued that it does not really capture the heart of the debate. Elegido's preliminary observation is helpful in showcasing the fact that law and morality do have a kind of overlapping relationship or boundary which, in crucial and urgent terms, legal positivists do not deny. At least, Bentham's jurisprudence is aware of this fact. As a matter of fact, Bentham may be willing to accept Elegido's contention, for the sake of argument, and yet still prove that Elegido's postulation does not still prove that law and morality have

---

[102] According to Bentham, the argument of the reactionist could also be this: "this is the law, therefore it is what ought to be".
[103] Bentham, *Of Laws in General*, Everett (ed.), 1945,
[104] J.M. Elegido, *Jurisprudence* (Ibadan: Spectrum Books Limited, 1994) p. 67.

an inseparable relation. Elegido's analysis only idealises the nature of the relation without painting it in the controversial sense in which it exists between these two schools.

Aquinas' naturalism is pungent enough to have problems with this conception of the relation between law and morality. Aquinas, for instance, defines law as nothing else than the ordinance of reason for the common good promulgated by him who has the care of the community.[105] This deductive definition of law implies that law is by nature interred in some set of moral principles, the absence of which violates the essential nature of law. Thus, if Aquinas were to respond to Bentham's thesis, we are bound to have a reasoning of this nature that "human law has the nature of law in so far as it partakes of right reason."[106]

The question is to determine what is meant by 'right reason.' We can suggest many possibilities for Aquinas but it is evident that what may approximate Aquinas' conception of 'right reason' may be an appeal to the nature of justice which every attempt at law-making should strive towards. This can be validated in the assertion of Aquinas that a deviation of human law from right reason makes a law an unjust one. "An unjust law," according to Aquinas, "has the nature, not of law, but of violence."[107] It is in this sense that, if we square Aquinas' conception of law with Bentham's command theory, the nature of the dispute will become clearer.

What then is implied in the insistence and the opposition to the insistence? In our understanding, what is implied is whether, indeed, an unjust law is no law or ceases to be a law? It appears from this standpoint that whatever position is maintained will carry

[105] Aquinas, T. "Law as the Ordinance of Reason" in *The Nature of Law*, M. P. Golding (ed), New York: Random House Inc., 1966, p. 12.
[106] Ibid., p. 16.
[107] Ibid., p. 16.

further implications. For the positivists, such a law is still one even if proved unjust. Such a law can be ostensibly defined as an immoral law.

The crucial question is whether, in the face of an immoral or unjust law, positivists, such as Bentham, would endorse obedience or disobedience. If positivists endorse obedience to an unjust law, then charges of establishing an undemocratic jurisprudence by positivists may appear justified. Cautiously, this may be true of Austinian jurisprudence which claims that the most "pernicious laws, and therefore those which are most opposed to the will of God, have been and are continually enforced as laws by judicial tribunals."[108]

It will thus place positivists and the positivists' programme of separability in a serious moral dilemma. To avoid such a moral dilemma, legal positivists would need to have defined a necessary moral agenda that explains how an unjust law will be handled. This moral dilemma is acknowledged in the thoughts of H. L. A. Hart.

If positivists affirm that an unjust law should not be obeyed, the whole idea of general positivists' insistence on the separability thesis will amount to an unnecessary conceptual entanglement or engagement, superfluity of nothingness, useless engagement in trifles and obvious impossibilities that do no good. It will imply that positivists are insisting on a programme, whose implication cannot be followed, logically, to its natural conclusion.

One can, however, argue that Bentham was not oblivious of some of these possibilities in the interpretation and understanding of the separation thesis. To use Hart's language, "Bentham and Austin were not dry analysts fiddling with verbal distinctions while cities burned, but were the vanguard of a movement which laboured with passionate intensity and much success to bring about a better society and better

[108] Austin, J. "Law as the Sovereign's Command" in M. P. Golding *op. cit.*, p. 96.

laws."[109] If this is so, the probing issue is whether it is a logically consistent position to hold in insisting on the separation thesis on one hand and labour vehemently, on the other hand, for the moral reform of laws. It is this tendency in the characterisation of Bentham's positivism that W. G. Paton described as "the disaster for English jurisprudence."[110]

This disaster can be classified as the error of projecting an inconsistent jurisprudence. It is this charge of inconsistency, if true, that inclines one to contend that the endless recrudescence of distasteful intellectual antagonism between the naturalists and the positivists over the relation between law and morality is a mere conceptual problem bordering on the use of concepts capturing and interpreting reality in different but complementary ways.

The other side of the dilemma is the position of naturalists, such as Aquinas, John Finnis, and d'Entreves who contend that such a law has not the nature of law. The implication of this, according to A. P. d'Entreves, is what gives legal naturalism its definitional name in the sense that law is not obeyed just because it is the law but, more importantly, in the recognition of its rightness.[111] The probing issue which naturalists have often found very disturbing is whether, even if it were true that such laws are defective, they imply that such laws are no longer valid enactments and, if not, what a citizen ought to do.

If we take Finnis[112] reaction to this puzzle, two possible statements could be deduced: in the first instance, Finnis could contend that such laws are not invalid in the technical sense: validity, in this instance, connoting the view that there is observance of proper procedures by persons having appropriate competence; in the second instance,

---

[109] Hart, Hart H.L.A., ¤Positivism and the Separation of Law and Morals¤, Harvard Law Review, vol. 71 (1957-58), p. 596.
[110] W. G. Paton, *Jurisprudence*, Oxford: Clarendon Press, 1972, p. 4
[111] d'Entreves, A. P. "Three Conceptions of Natural Law" in M. P. Golding, *op. cit.*, p. 35.

Finnis could also contend that the legal duties or rights they impose could be genuine duties or rights, regardless of the moral wrongfulness of the law. If Finnis' submission is anything, it is likely to be that such laws are defectively obligatory, in the moral sense. By this is meant that, from a moral point of view, such laws weaken any sense of moral obedience one may have towards such laws.

The dilemma of naturalists' insistence on the inseparability thesis consists in the inability to translate what is considered defectively obligatory in the moral sense to a defective obligation in the legal sense. Thus, it is pertinent to ask whether a law that is defective in terms of obligation in the moral sense is also defective in terms of obligation in the legal sense. What is obviously implied is that there is a distinctive notion of legal obligation and a distinctive notion of moral obligation.

It, however, lies within the realm of the possible that that which is distinctively legal may be overridden by that which is moral, depending on the extent of the injustice that characterises a given law, if not a given legal system. Framing the puzzle in an evaluative format, J. C. Smith offers three possible criteria for which legal obligation may be overridden by a sense of moral obligation: one, where the law in some way or the other offend the principle of formal justice or one or more of the principles derived therefrom, such as due process, equality before the law, or the rule of law; two, where the content of the law runs counter to the justification predicated of the legal system by the use of obligation language in an evaluative sense; three, where the content of the law interferes with or is detrimental to the rational thought processes.[113] In all, the moral criteria for evaluating laws have been viewed in different perspectives. About the most recurrent idea of moral criteria for evaluating bad laws is that laws must

[112] Finnis, J. *Natural Law and Natural Rights*, Oxford: Clarendon Press, 1980.
[113] Smith, J. C. *op. cit.*, pp. 140-143.

incorporate elements of justice such as principles enshrined in the canons of accepted morality.

A contrary view is that of Joseph Raz. For Raz, while it is true that there are legal and moral obligations, in a distinctive sense, it is possible to contend that having a legal obligation can be argued to be an obligation in the moral sense such that even if a law were to be regarded as unjust, the fact that it raises an initial claim to legal obligation, raises a claim to having an obligation to that law in a moral sense too. For Raz, this conviction is based on the fact that when law demands our obligation in a given matter, it does so by virtue of the fact that the machinery and mechanism for the promulgation and enforcement of those decisions are morally legitimate and binding. The moral legitimacy ascribed to law stems from the fact that for Raz, the law - unlike the threats of the highwayman - claims to itself legitimacy. The law presents itself as justified."[114] To this end, argues Raz, the legitimacy that laws has not only elicits a legal obligation but equally a moral obligation.

If we are to take Raz's argument as sufficient enough to transcend or traverse the distance between the purely legal and the purely moral, and adopt Raz's argument as explaining the morality of legal obligations, there must be a further attempt to fill the gap, argues Matthew Kramer, between systems that profess a claim to moral authority and those that are actually in possession of such moral authority.[115] Only this will count as sufficient, it is supposed, in establishing the moral authority that legal systems ought to have and indeed do have. A legal system that professes moral authority is, in a sense, different, morally, from a system that is morally legitimate.[116]

---

[114] Raz, J. *The Authority of Law*, Oxford: Clarendon Press, 1979, p. 158.
[115] Kramer, M. "Legal and Moral Obligation" in *The Blackwell Guide to the Philosophy of Law and Legal Theory*, Malden, Massachusetts: Blackwell Publishing Limited, 2005, p.183.
[116] Raz distinguishes between moral legitimacy and moral obligatoriness. According to him, a legal norm is morally legitimate insofar as it does not require or authorize conduct that violates anyone's moral rights. A legal norm is morally obligatory insofar as its addressees are morally required to comply with its terms

The series of arguments and counter-arguments so far shows, in our view, the complementary nature of the disagreement between the naturalists' and the positivists' positions on the relation between law and morality. But if carefully weighed, there is no need for separate moral criteria for evaluating bad laws. A bad law is a bad law. Our intuitive feelings many times confirm this. Even where a morally legitimate regime or system makes a law, it is incumbent to suggest that, aside from the claim to moral legitimacy, an independent reason for the moral propriety of laws will still need to be accounted for.

The claim that a law made by a morally legitimate system is morally binding tends to be a questionable claim. The moral legitimacy of any system or regime is what confers on us the moral duty of subjecting each law to a moral scrutiny. In other words, such legitimacy grants what can be regarded as an 'aura of moral confidence' in carrying out such a task. In fact, it is a moral duty to subject every system to a moral test. The absence of this aura of moral confidence is what guarantees our assertion concerning the nature of a regime as either legitimate or illegitimate. The doctrine of judicial review offers an excellent example of the subjection of a regime or system to a moral scrutiny.

It appears very clear, therefore, that an insistence on separation of law and morals does not necessarily guarantee our sufficient willingness or abilities to see the issues involved in morally bad laws. In fact, it is sufficient that laws and moral be so close so as to enable us see and assess their worth in the entire sense.

---

or to acquiesce in what it authorises. See Raz, J. *Ethics in the Public Domain*, Oxford: Clarendon Press, 1994, pp. 317-318.

2.3.3.4 JOHN AUSTIN AND THE SEPARABILITY THESIS

If there were any concept or thesis that legal positivism has enjoyed from the analysis of John Austin, it is, in obvious terms, a well refined and articulate formulation of the language of the separability thesis. According to Oladosu, the separability thesis would prove to be the most enduring element of Austinian positivism. Austin himself was uncompromising on the validity of the separability thesis.[117] But then, it behoves us to attempt an intellectual analysis of how Austin derived the separability thesis. What then is Austin's notion of the separability thesis? What are the grounds for Austinian conviction for the separability thesis?

A first point to note is that Austin's analysis of the separability thesis cannot be understood once the salient elements of law, according to him, are not understood. According to Austin, laws are social facts i.e. the sovereign's command. The sanction of the sovereign is an indispensable aspect of law. A law without sanction is a contradiction in terms. Given this, there can be no necessary connection between law and morality. This is Austin's famous expression of the separability thesis. According to John Austin, the separability thesis is the assertion that law and morality are not necessarily related.

Before we can attempt a critical assessment of Austin's separability thesis as couched above, notions such as sovereignty, obligation and sanctions are germane to Austin's work and, as a matter of fact, are in need of being made clear through analysis. For Austin, law as social facts consists in the contention that law is the command of the sovereign. This conceptual rendition of law is not original with

---

[117] Oladosu, Jare (2001). Choosing A Legal Theory On Cultural Grounds: An African Case For Legal Positivism. *West Africa Review:* 2, 2 [iuicode: http://www.icaap.org/iuicode?101.2.2.2]

Austinian jurisprudence; it has its origin in Bentham. It is not even certain that Bentham conceived of the idea in its originality.

Any original attribution of that doctrine will have to be credited to Thomas Hobbes, whose political philosophy was clustered around the idea of sovereignty. But then, Austin can be credited with the fact that he made an enduring and painstaking analysis of the idea of sovereignty in relation to the idea of sanction and punishment. Besides this, unlike Bentham, Austin adopted the method of exposition just like Blackstone, in limiting the province of jurisprudence to an analysis of the more general concepts which occur in any given system of positive laws, its rules and principles.[118] These concepts attach to Austin's work a heavy dose of intellectual and jurisprudential importance.

Of interests and lasing importance is the fact that even though the idea of sovereignty was not original to the thoughts of Austin, to Austin can be credited an insightful insistence on the idea of sovereignty as a means of ensuring that the total separation of laws from morals is accomplished. Thus, part of the lasting juristic worth of Austin's imperative theory of law was that on it was built the separation thesis. While Hobbes's idea of sovereignty conflated both law and morals as consisting in the will of the sovereign, in the process, absorbing natural law in the canons of civil law, this absorption is denied and transcended in Austin. What then is the idea of sovereignty and who then is a sovereign?

A sovereign, in the language of Austin, is a determinate person or group of persons who is rendered habitual obedience but who does not render any such obedience to any one - by the bulk of the population of a politically independent society.[119] Since this notion is significant in Austin's jurisprudence, the historical

[118] Friedrich, C. *op .cit.*, p. 98.
[119] See Austin, J. "Law as Command of the Sovereign" in M. P. Golding, *op. cit.*, pp. 91-92.

import and context of the meaning of the word 'sovereignty', in relation to Austin's analysis, should be given adequate attention.

The word 'sovereignty' is derived from the Latin word *superanus* which means supremacy. The concept thus has a long and prismatic history. The history dates back to the era of Greek philosophers such as Plato, Socrates and Aristotle. These scholars and political thinkers gave heed to the simple view that sovereignty connotes final, absolute, coercive power of the State over its citizens. This is quite understandable in the light of the fact that an agreement to live within the boundary of a particular state compels one to agree or consent to obeying the powers of the state. This is what underlies the ideas of consent and contract theories couched in explaining the origin of society. It is in this sense that one can readily understand the view that, historically, sovereignty depicts the powers of the state.

However, the synchronous meaning of the term 'sovereignty' was lost as a result of the fall of the state's power especially under the Roman Empire. The resultant effect was the institutionalisation of state power in the Church. The crumbling of the veracity of Church authority, and religious unity in general, during the era of wars of religion and the Reformation protest of Martin Luther occasioned the revival of the classical concept of sovereignty as state power. According to Soltau:

> *There stood now in each state a sovereign, in the sense of a definite organ or organisation within each territorial community, having final authority to define and pronounce the law therein, and having likewise final authority to adjust rivalries among all possible claimants to power.*[120]

It is from this conception of sovereignty that the idea of the nation-state developed. Inherent in the conception is the idea of legitimacy of state power especially when evaluated in the light of the citizen's interests and rights. Again, the Industrial Revolution in Europe gave credence to the view that state power extends

[120] Soltau, quoted in J. H. Price's *Comparative Government*, Hutchinson Press, 1979, p. 26.

over the day-to-day lives of its citizens, stating, in a very curious way, the view that the state has unlimited power to define, entrench and safeguard the rights and privileges of its citizens on one hand and to limit and encroach on their liberties on the other hand. This, in part, accounts for the emergence of liberalism as a political and welfarist doctrine with the strong claim that state power over individual's liberties has a limit. A pragmatic proponent of this liberal tendency is John Stuart Mill,[121] himself a utilitarian like Austin.

In modern times, there is a whole lot of confusion bedevilling the charm and the appeal of the concept of sovereignty and the gamut of ideas and notions connected with it. One of such confusions over the term 'sovereignty' has to do with the distinction between what is referred to as legal sovereignty and political sovereignty. Legal sovereignty refers to the powers of the state to make laws which are, in themselves, supreme and binding within that state. In most cases, this power is often located and exercised by the legislative body. The experiences of other countries tend to show that the law courts exercise the sovereign power with respect to the interpretation and application of the law.[122]

On the other hand, political sovereignty refers to the body of persons whose authorities, will and orders are binding and to be obeyed. But then, who is the political sovereign? The problem of distinction besetting the concept of sovereignty with respect to the difference between legal and political sovereignty is clearly

[121] John Stuart Mill, in a scintillating and interesting chapter (IV) of his work *On Liberty*, argued that there is limit to the powers of the state over the rights and liberties of the individual. While Mill's views continue to attract both defences and attacks, the issues involved have become of interesting dimension in social and political philosophy. See J. S. Mill, "On Liberty" in *The English Philosophers from Bacon to Mill*, edited with an introduction by Edwin A. Burtt, New York: Random House, Inc. published for the Modern Library, 1939, p. 1007-8.

[122] A case in point is the American Supreme Court which exercises an unparalleled supremacy when it comes to the issue of interpretation and application of the law. This has been the contention of Legal Realists. See Holmes, O. L. W. Jnr. "Law as the Prophecies of What Courts Will Do" in M. P. Golding, *op. cit.*, pp. 174-187.

reflected in the quest for what is regarded as the source and/or location of sovereignty. How do we then locate the sovereign in a given society?

One of the most enlightening, enduring, popular and painstaking analysis on the location of the sovereign in any given society is that given and provided by John Austin. According to Austin,

> *If a determinate human superior, not in the habit of obedience to a like superior, receives habitual obedience from the bulk of a given society, that determinate superior is sovereign in that society, and that society is a society political and independent...every positive law, or every law simply and strictly so-called, is set, directly or circuitously, by a sovereign person or body to a member or members of the independent political society wherein that person or body is sovereign or supreme.*[123]

Austin's analytical framework on the concept of sovereignty in any political society draws the following implications:

1. In every political society, there must be a sovereign whose political power is absolute, unlimited and indivisible;
2. Given 1 above, it follows hat it should be possible and necessary to locate, in a clear manner, the political sovereign in such a society;
3. The command or will of the sovereign is binding on his subjects who are in the habit of obeying the will of the sovereign;
4. A failure to act in line with the sovereign's command attracts necessarily a punitive measure or a punishment for the act so committed;
5. The sovereign in that political society or state need not be an individual; it may be one individual or a body of individuals;

Austin's idea of sovereignty has become the object of vociferous attacks. Specifically, each of the analytical frameworks provided by Austin to measure and establish the very basis of the sovereign's power has been branded as inadequate and lacking a thorough agreement with the political realities and practical experiences of

political societies. Harold Laski, for instance, contended in the general sense that the concept of sovereignty should be utterly discarded. According to Laski, it is expected that it would be of lasting benefit to political science if the whole concept of sovereignty were surrendered and done away with. Laski tends to have drawn an essential distinction between what can be regarded as a realistic view of sovereignty and Austin's legalistic view.

According to Laski, Austin's analysis bears the image and imprint of extreme legalism, devoid of the expedience of practical politics. For him, the state is not simply an abstraction dwelling in the world of forms. The state is an arrangement of institutions built and founded on the premise and promise of giving practical existence and creating an impregnable realism to needs and aspirations in the society. A deflection from this anticipated end or purpose creates a lasting breach in the expected teleology.[124]

Again, Austin's conception of sovereignty suffers a set back when viewed in the light of some exiting maxims or principles expressly adopted or accepted as forming part of the canon for the regulation of the powers of the sovereign, granted that it is indeed possible in such society to locate the sovereign. These maxims are meant to be obeyed habitually by the sovereign. Sir Henry Maine posited that such maxims may come in the form of customs and practices or conventions, especially in underdeveloped communities where the age of adherence to customary or moral practices is still accepted as part of the procedure for governance.[125]

Substantively, the core of the controversy on the concept of sovereignty as postulated by Austin, for instance, centres on the supposed distinction between the postulations of the pluralists and the arguments of the monists. The heart of the

---

[123] Austin, J. "Law as the Command of the Sovereign", pp. 94-95.
[124] Laski, H. *A Grammar of Politics*, Ch. II, London: Allen and Unwin, 5th Edition, 1952.

distinction tends to render as inherently controversial the substance of the idea of sovereignty. For the pluralists like Harold Laski and Cole, the state is one of the several associations within a political community. To this end, it cannot be invested with absolute power as conceived in the language of Austin. There are, it is claimed, as many sovereigns as possible in a given state. The state functions, in the important sense, as a product of shared pre-commitment on the part of the citizenry.

For the monist, on the other hand, these associations are created by the state. In short, it argues that these associations are dependent on the state for their continued existence. The powers they may be found to possess are so in so far as the state allows it.

The heart of the controversy goes to show the depth of intellectual disparity between the two schools of thought. However, the important conclusion from the study is the fact that the pluralists' contention is an attempt to supplant the state as a political entity rather than supplement it. To this end, it can be said that the disparity between the pluralists and the monists over the idea of sovereignty only tends to project the nature of incompleteness that besets the idea of sovereignty and hence of its political and social utility in relation to our ultimate reasoning on the concept of law.

Even at this, it is suggested by H. L. A. Hart that while it is possible to reject the Austinian contention that law can be understood via the notion of sovereignty, the separability thesis as highlighted by Austin still stands as a veritable thesis and contention of legal positivism. In the opinion of Hart, "it is still possible to endorse the separation between law and morals... and yet think it wrong to conceive of law as

[125] Maine, H. (Sir) *Lectures on the Early History of Institutions*, Murray, 1914, pp. 308-392.

essentially a command."[126] To what extent is Austin's notion of the separability thesis plausible? According to Austin,

> *The existence of law is one thing; its merit or demerit is another. Whether it be or be not is one inquiry, whether it be or be not conformable to an assumed standard, is a different enquiry. A law, which actually exists, is a law, though we happen to dislike it, or though it vary from the text, by which we regulate our approbation or disapprobation*[127].

Austin's jurisprudence of separabilism, as set forth above, is a pointer to some of the philosophical themes that makes the school of existentialism strikingly unique and spectacular as a way of doing philosophy. One of the unique features of existentialism concerns the distinction between existence and essence. The question is does existence precludes the essence of a thing? In what sense is existence different from the essence of a thing? Can the essence of a thing be removed, conceptually, logically and practically, from its existence?

According to the Wikipedia Encyclopaedia, Existentialists' concept of existence preceding essence is important because it describes the only conceivable reality as the judge of good or evil. If things simply "are", without directive, purpose or overall truth, then truth (or essence) is only the projection of that which is a product of existence, or collective experiences. For truth to exist, existence has to exist before it, making it not only the predecessor but the 'ruler' of its own objectivity.

In the light of the above, Austin's contention on the separability thesis can be appraised in the light of this existentialist dictum. From a perfunctory reading, it appears that even though existence precedes essence, existence itself is a justifier and a corroboration or setter forth of what essence is. In other words, essence cannot

---

[126] Hart, H. L. A. "Positivism and the Separation of Law and Morals", *Harvard Law Review*, vol. 71 (1957-58), p. 601.

[127] John Austin," Law as the Sovereign's Command" in *The Nature of Law* in M.P. Golding (ed.) New York: Random House, Inc., 1966, p. 95.

be talked about outside the concept of existence such that essence can be justifiably said to be incorporated in the idea of existence.

As emphasised by existentialists, such essence may not be conceived entirely in the sense of an absolute reality, a concept which in itself is subject to serious questioning. As a matter of fact, essence may be said to be multifaceted and subject to many philosophical uses. But then, the dialectics of the existence-essence distinction shows that existence presupposes essence. While essence does not presuppose existence, existence, however, presupposes essence inasmuch as existence definitionally entails essence.

As a matter of fact, the mere fact of existence is not only a pre-condition for essence but equally a prima-facie argument for essence. Essence may not connote existence since it is possible to conceive of essence without a notion of existence entailed in it. Thus, the existential versus essential distinction shows that while it is possible, existentially, to distinguish existence from essence, it is somewhat impossible, on essentialist terms, to sustain a distinction between existence and essence. Essence is built into what really is. Essence is not built into what is not nor does it define what is not.

What we tend to have gained in Austin's account of the separability thesis is the view that effectiveness, as an idea or ideal, replaces justice as a matter of priority and importance. The effectiveness of law is generally regarded as the third thesis of legal positivism. Legal positivists accept the *existence* thesis, that is, they agree that the existence of law presupposes that it is effective.[128] The requirement that law be effective is usually understood to mean that the citizens must, on the whole, obey the law. As Kelsen explains, "[a] legal order is considered valid if its norms are by and

[128] See Spaak, Torben "Legal Positivism and the Objectivity of Law" in *Analisi e diritto 2004*, a cura di P. Comanducci e R. Guastini, p. 257.

large effective, i.e., if they are in fact obeyed and applied."[129] But then to characterise a system as effective is not measurable by what 'is' alone but, additionally, by other means. This is what Mario Jori meant when he contended that "all positivists replace the moral commitment to justice...with the aim of a value-free description of effective legal systems. From the claims of effectiveness is derived the idea that Austin's positivism endorses and espouses the doctrine of conformism which is itself an aspect of the *reductio ad Hitlerum*.[130]

And this is not difficult to see in Austin's jurisprudence since the nature of law speaks of a command. The doctrine of conformism, as espoused in positivists' insistence on the separation thesis, one could guess, is buttressed by Austin's conviction that even "pernicious laws, and therefore those which are most opposed to the will of God, have been and are continually enforced as laws by judicial tribunals."[131] Austin, in furthering the thesis of separation, even argued that

> *Suppose an act innocuous or positively beneficial, be prohibited by the sovereign under the penalty of death; if I commit this act, I shall be tried and condemned, and if I object to the sentence, that it is contrary to the law of God, who has commanded that human lawgivers shall not prohibit acts which have no evil consequences, the Court of justice will demonstrate the inconclusiveness of my reasoning by hanging me up, in pursuance of the law of which I have impugned the validity. An exception, demurrer, or plea, founded on the law of God was never heard in a Court of Justice, from the creation of the world down to the present moment.*[132]

In the light of the foregoing, one may want to ask whether Austin's jurisprudence could be interpreted as outrightly endorsing injustice. An affirmative answer to this question will not be defensible, rather, it will be better to say that Austin's position only shows the partial limitation and error inherent in positivists' conceptual formula for understanding the phenomena of law. Brian Bix takes this objection to be a

---

[129] Kelsen, Hans RR, *supra* note 12, at 219. (Translated into the English by Robert Carroll).
[130] See Jori, M. "Legal Positivism" in *Routledge Encyclopaedia of Philosophy*, Edward Craig (ed.), New York: Routledge, 1998, p. 515.
[131] Austin, J. "Law as the Sovereign's Command" in M. P. Golding *op. cit.*, p. 96.
[132] Austin, J. "Law as the Sovereign's Command" in M. P. Golding *op. cit.*, pp. 96-7.

misunderstanding of legal positivism. According to him, legal positivism is better than the natural law theory in this regard in the sense that there is a distinction between the law that 'is' and the law that 'ought' to be; that legal naturalism, by equating legal status with moral status, engenders a kind of confusion among the populace between whether a rule is moral just because it happens to be treated as valid or that the validity is determined by its moral worthiness. From a critical point of view, this is equally a misunderstanding of legal naturalism. Legal naturalism does not claim that a rule is moral just because it happens to be treated as valid. Rather, the emphasis of naturalism is the very view that positivists are prone to deny, which is that, a rule that is unjust does not deserve anyone's obligation.

If we are to take Austin's formula in the holistic sense, the elements that were left out in his defence of the separability thesis are: a critical account of what conception of justice is endorsed by legal positivism; what the nature of that justice is; and, in what that justice consists. According to Austin, embedded in every legal system, consisting of Court of Justice and other similar institutions, is a kind of justice, but in what that justice consists is not accounted for.

As a matter of fact, Austin demonstrated the incompleteness of his argument by an appeal to an historical argument, that is, what has never happened in the Court of Justice, in support of the separability thesis. But it could not follow that since the Court of Justice, right from creation had not entertained an exception to human laws based on the Law of God, they could not be cited as an exception to a rule. Austin's defence of the separability thesis in this instance is not dependent on what is logical but what is historical.

The fact that such an exception has not taken place in a Court of Justice does not mean it can never happen. Besides, it is not too clear whether what is involved in

the rejection of the positivists' position is the issue of validity, but what it appears many legal non-positivists have tended to assert and argue out consists in the proposition that such a law that appears unjust is defective in terms of obligation, which of course is a subject of common concern.

One last comment can be raised in the light of Austin's formulation which is the view that even if it were true that the existence of law is one thing, it is not true, however, that the existence of law is not subject to any standard, as claimed by Austin. The truth is that there are many standards or test. For example, in Shariah states, the standard in vogue transcends the legal and borders on the religious.

Certainly, we have not argued that the separability thesis is false in its entirety. What might have been postulated so far could be that Austin's version contains some conceptual anomalies which, on careful thought, might have been taken care of by other positivists', particularly contemporary ones. This may appear to tally with the observation of Brian Bix who contended that it is in general a bad idea to read texts on law from the distant past with the assumption that the concerns of the authors of those texts are the concerns of contemporary analytical jurisprudence.[133]

Even though Austin's jurisprudential analysis appears to have formed one of the foundations of legal positivism and to have provided a clear understanding of the separability thesis, it is not a matter of historical contention that much of contemporary legal positivism has transcended some of the analysis and flaws inherent in Austinian jurisprudence. It is in the light of this that we shall consider the views of H. L. A. Hart on the separability thesis, deciphering as it were, the contemporary realities which that conception elicit and raise for contemporary jurisprudential thinking.

---

[133] Bix, B. "Natural law Theory" in *A Companion to Philosophy of Law and Legal Theory*, Dennis Patterson (ed.), Oxford: Blackwell, pp.223-240, at p. 227.

2.3.3.5 H. L. A. HART AND THE SEPARABILITY THESIS

H. L. A. Hart's contribution to jurisprudence cannot be fully appreciated just as an introduction that commences with a critique of John Austin's command theory of law. It is commonly agreed that jurisprudence, or legal philosophy, was revitalised by H. L. A. Hart. According to George Letsas,

> *The fate of influential philosophical works is well known. They tend to attract general admiration only at the cost of receiving sophisticated criticisms about alleged contradictions, question-begging arguments, misunderstandings etc. As the text becomes more and more alienated from its author - and ultimately posthumously - critics start wondering how the author could miss a certain point, fail to draw a certain conclusion or to see an obvious inconsistency in his work, as if they would have done it themselves, were they to write the same book from the very beginning. H. L. A. Hart's distinctive place in the 'big book' of jurisprudence is by now well established... Hart's shadow hovers...his theory remains by far the most interesting and internally consistent version of legal positivism.*[134]

Hart introduced his *Concept of Law,* as 'an essay in analytical jurisprudence, for it is concerned with the clarification of the general framework of legal thought'.[135] With this, Hart set the task of solving a peculiar problem that had baffled legal theory since the time of Bentham. That problem is the abstract character of legal concepts (like corporation, right, duty). In another sense, H.L.A. Hart regarded his work also as an essay in descriptive sociology."[136] In descriptive terms, the work was an attempt to provide a descriptively accurate and theoretically illuminating account of legal systems, and of the concepts we actually use in practicing and (in various ways) talking about law.[137]

In this sense, arising from both perspectives, Hart's theory was both conceptual and descriptive. Conceptual, because it was concerned with the analysis and clarification of concepts. Descriptive, in the sense that it was aimed at giving an

[134] Letsas, George *op. cit.*, pp. 187-188.
[135] Hart, *The Concept of Law*, 1st ed., p. v.
[136] Hart, *The Concept of Law*, 1st ed., p. v.

empirical and descriptive account of actually existing social phenomena. The implication of this is that Hart's work stands to be validated as true or false in empirical terms. The empirical status of Hart's work can also be ascertained in the fact that, according to him, all systems we conceive of as legal include a foundational rule of recognition.

This has been a major problem with Hart's claim in the sense that such a system or society with an identified or identifiable rule of recognition may be hard to come by. Moreover, it is possible, quite to Hart's disappointment, that there are many societies in which rather than legal considerations, moral ones play a vital, significant role in the criteria of legal validity.[138]

But then, while it was logically and practically possible to reject Austin's command theory, Hart found the doctrine of separability attractive for the normative thesis or version of modern legal positivism. Hart rejected Austin's command theory partly because Austin omitted and neglected a variety of laws that are possible within a legal system such as right-conferring laws; and also partly because the attempt to reduce laws to empirical terms in terms of observable practices and behaviours, omits an essential aspect of law which is the general attitude of acceptance on the part of the citizens and officials of the system that the rules of the system give rise to actions and thus should be obeyed.[139] Despite the rejection of the command theory, Hart argued for the separability thesis.

---

[137] Waluchow, *op. cit.*, p. 6.

[138] Islamic societies are eexamples of such societies where moral or religious considerations play a vital, significant role in the criteria of legal validity. An aspect of this in Islamic jurisprudence can be corroborated in the idea of Shariah. In Islamic jurisprudence, Shariah means the path established by God for men to follow in order to succeed in all aspects of worldly and spiritual life. Shariah as a system of law has three sources namely: the *Quran*, the *Sunnah*, and human reasoning through *Ijtihad*. See Sayed, H. A. Malik, "Shariah: A Legal System and a Way of Life" in *Perspectives in Islamic Law and Jurisprudence. Essays in Honour of Justice (Dr) Muritala Aremu Okunola (JCA)*, edited by M. Oloyede Abdul-Rahman, NAMLAS Publications, 2000, p. 25.

[139] Hart, H. L. A. *The Concept of Law*, Oxford: Clarendon Press, 1994, pp. 13, 55-58, 82-84.

For Hart's normative positivism, there is no necessary, conceptual connection between law and morality, even though this claim may not necessarily be grounded in a command theory. In other words, the separability thesis can stand all alone despite our rejection of the command theory of law. This can be proved just in case it is possible to build a theory of law that is positivistic and at the same time different from the command theory.

According to Hart, the separability thesis takes off from a reformulation of Austin's analysis: it is to be noted, however, that Hart's reformulation of Austinian separability thesis tends to weaken, in a sense, the importance of the distinction between the existential and the essential. When Hart wrote that

> *what Bentham and Austin were anxious to assert were the following two simple things: first, in the absence of an expressed constitutional or legal provision, it could not follow from the mere fact that a rule violated standards of morality that it was not a rule of law; and conversely, it could not follow from the mere fact that a rule was morally desirable that it was a rule of law*[140]

what he Hart was undermining was the claim that while the existence of a thing presupposes its essence, an essence does not define a thing into existence. A rule may indeed be morally desirable but, in line with Hart, it does not follow that it is a rule of law because the test of legal validity will still have to take shape.

Thus, from this standpoint, an essence cannot define law nor define it into existence. However, existence presupposes essence such that it is possible to reason that while a rule is a law, its exact nature brings into proper focus the idea of obligation which it elicits naturally. If we take Austin's contention seriously that a law without obligation is a contradiction in terms, this contradiction should not be viewed in the light of sanctions and punishment which Austin excessively exaggerates as the essence of law, but in terms of the attitude towards the kind of law that it is.

Thus, with Hart's latter part of the expression of the separability thesis, there may not be much to contend with. The former expression in our opinion simply states that positive human laws are not limited by standards of morality. If a law, for instance, states that men of certain ages be conscripted into the army for a particular purpose, questions may be legitimately raised about the purpose for which the army wants the men. Such a rule of law will, on the basis of its moral implication or undertone, be held as questionable and defective in terms of obligation. One interesting lesson one can learn is the view that the existence of a law is not all that there is to be considered. Its existence also presupposes its essence. In one word, it suggests to our thinking that moral limitations constitute one important dimension to the essence and validity of laws. Is 'essence' or purpose necessarily a matter of morality? Moral reasons may constitute one the dimensions for understanding what 'essence' is.

Furthermore, Hart's analysis and contention above talks of `standards of morality'. But then it is not at all clear what he means by "standard of morality". This is because, there are three levels by which we may pass judgement: the standards that we require, those that we desire, and the ones we revere. The general label "standard of morality" has the tendency of blurring these distinctions or the distinctions between moral values that are within or in the law and those that are outside the law. And often where the law deals with questions that are characteristically within the realms of morals, or where the legal doctrine so conspicuously overlaps with what we are used to call morals, it should be seen clearly as a limiting factor in what is accepted, in morally obligatory terms, as a rule of law.

To this extent, moral values or questions are crucially authoritative voices in what can be regarded or accepted as a rule of law. One is inclined to argue that the

[140] Hart, H. L. A. "Positivism and the Separation of Law and Morals", *Harvard Law Review*, vol. 71 (1957-58), p. 599.

meaning of the term 'rule of law' is not restricted to what is legal alone. In popular coinage, it sometimes refers to the existence of a moral order inherent in legal systems and which acts as guide in its functioning and application. If it has meaning at all, it is the view that a rule of law reigns supreme because of the rule of a moral order inherent in it. If this is not what is meant by the expression 'rule of law', then it is not mistaken to say that the concept of law promotes the idea of arbitrariness. If moral standards are not important in what is accepted as rule of law, then it follows that such rules of law include forms of arbitrariness.

This can be clearly seen in John Finnis' criticism of Hart's and the positivist programme of insisting on the separability thesis, that it could not follow that a rule violated standards of morality that it was a rule of law or the statement that "it can be claimed for the simple positivist doctrine that morally iniquitous rules may still be law[141] In this case Hart's contention is that such a rule is still the "law but too iniquitous to obey or apply.[142]

Finnis' critique of this positivist standpoint is instructive. Finnis contends that "the programme of separating off from jurisprudence all questions or assumptions about the moral significance of law are not consistently carried through by those who propose it. Their works are replete with more or less un-discussed (moral) assumptions."[143] To contend, like Hart did, that a rule which is clearly morally iniquitous, unjust and repugnant is still a law and binding is not only a relapse into 'the gunman situation' of Austin, but also generally held to be inconsistent with his idea of general acceptance of a rule as important in any analysis of the concept of obligation. If "general acceptance"

---

[141] Hart, H.L.A. *The Concept of Law* (Oxford: Clarendon Press, 1961) p. 207

[142] Ibid. p. 205

[143] John M. Finnis, *Natural Law and Natural Rights (Oxford, 1980) pp. 358-9*

of a rule is quite important, where then does Hart place this "general acceptance" when it comes to the issue of morally iniquitous, unjust laws?

We can ascribe to the naturalist thesis a claim of presumptive credibility. But this presumptive credibility must not be allowed to flourish in the court of misunderstanding of positivists' thesis of separation nor scope on some ambiguities in the interpretation of legal positivists' thesis. In this light, one general defence of positivists' separation thesis is the view that many of the attacks on legal positivists, such as that it endorses an attitude of conformism,[144] or that it asserts some version of "might makes right"[145] or that the separation thesis entails a kind of schizophrenia of positivist legal theory,[146] arise from a kind of confusion in the reading of legal positivism, in the sense that such interpretations, apart from bordering on conceptual confusion, consist in conflating what is said and what is implicated.[147]

Thus, it is possible that the presumptive credibility ascribed to naturalism is not a sustainable thesis once it is the case that it trades on certain misunderstanding and misinterpretation of what legal positivists' separation thesis means. After all, positivism means different things to different people. What it means to the supporters is different from what it means to its rejectors. What is often appraised about positivism and its separation thesis depends on the conceptual parameters used in such appraisal.

If our observation is right, it is rightly contended that what naturalists and positivists are disagreed upon consists in whether it is possible to sustain an attitude of obligation where it is the case that a law that actually exists is truly unjust. It can therefore be said that the naturalist assessment of the positivists' thesis is not a trade

---

[144] See Jori, M. "Legal Positivism" in *Routledge Encyclopaedia of Philosophy*, Edward Craig (ed.), New York: Routledge, 1998, p. 515.
[145] Bix, B. "Legal Positivism" in *The Blackwell Guide to the Philosophy of Law and Legal Theory*, Malden, Massachusetts: Blackwell Publishing Limited, 2005, p.31.
[146] Stocker, M. "The Schizophrenia of Modern Ethical Theories" *The Journal of Philosophy*, 73 (1976), pp. 453-465.

on what is said and what is implicated, but rather a case of what is meant. As argued by Anthony D'amato, positivists' insistence on the separation of law from morality, places legal positivists in a tight intellectual and moral position. This insistence, he argues, imbues the positivist's creed with some dose of logical and intellectual inconsistencies. These inconsistencies, for him, arise from the separation of law from morality. In his words,

> *Not only do positivists insist upon separating law from morality, but they also appear to be unable to deal with moral questions raised by law once the two are separated. This inability stems, I believe, from their simultaneous attempt to assert and to prove that law and morality are separate; the argument reduces to a vicious circle*[148].

Positivists' answers have not been duly satisfying; they involve elements of assertive insistence on separation on one hand, while admitting the factuality and possibility of injustice on the other. This dilemma can be buttressed in the analysis of Hart. While this dilemma is factually noticeable in the analysis of most positivists, it tends to serve another function: that of weakening the tenacity and strength of the separability thesis. According to Hart, the language of the separability thesis consist in the "simple contention that it is in no sense a necessary truth that laws reproduce or satisfy certain demands of morality, though in fact they have often done so."[149] However, in another light, Hart, reacting to the possibility of injustice, contended as follows

> *What surely is most needed in order to make men clear sighted in confronting the official abuse of power, is that they should preserve the sense that the certification of something as legally valid is not conclusive of the question of obedience, and that, however great the aura of majesty or authority which the official system may have, its demands must in the end be submitted to a moral scrutiny*[150].

---

[147] See Horton, R. "Positivism and the Internal Point of View" in *Law and Philosophy*, 17, 1998, 597-625, at p. 599.
[148] Anthony D'Amato, *The Moral Dilemma Of Positivism*, 20 Valparaiso University Law Review, 43 (1985) Code A85e, p. 1
[149] H.L.A. Hart, *The Concept of Law*. p. 181.

[150] H.L.A. Hart, *The Concept of Law*. p.206.

Evidently, therefore, there seems to be a modicum of moral dilemma in the separability thesis as advocated in legal positivism. D'Amato's observation is equally helpful in this regard. According to him, the moral dilemma of legal positivism arises from an engagement in circularity whenever questions of moral obligation to the law are raised. The moral dilemma inherent in legal positivism on the separability thesis seems to be the basis of naturalists' rejection of the thesis of separation and thriving insistence on non-separation.

However, there is another dimension to Hart's formulation of the separability thesis. While trying to save positivism from relapsing to the gunman situation painted in Austin's positivism, Hart provided a normative account of the nature of law. This normative account has been described as a scientific and factual presentation of the nature of law which is consistent with the aim and fervour of the spirit of positivism. This normative account of the nature of law, according to Hart, is what distinguishes a legal system as a regime of laws from a regime of brute force. This concerns the argument from the internal point of view.

What is the internal point of view according to Hart? And how does it shed light on the positivists' insistence on the separability thesis? The internal point of view as postulated by Hart may not be readily understood except where there is a corollary treatment of his idea of obligation. In trenchant terms, the idea of internal point of view is functionally related to the meaning of the obligation. In a legal system, according to Hart, what distinguishes that system from a regime of brute force and which ultimately makes the officials to have a sense of obligation, for Hart, consist in the internalisation of the rules existing in that system.

Of primary importance is the fact that Hart's theory of obligation is derivative of his positivism. Amidst many controversies on the source of Hart's theory of

obligation, it may be legitimately contended that Hart developed his theory of obligation to justify his positivism. This is why, though excellent an account it is, yet the fall out of positivist dilemma seems to be haunting that theory. According to J. C. Smith, it is precisely at the point where Hart's theory of obligation relates to his positivist worldview that the theory broke down.[151]

For H.L.A. Hart, rules are very significant in any consideration of the nature of law. "Where there is a law," according to Hart, "there human conduct is made in some sense non-optional or obligatory."[152] Such rules of obligation are supported by great social pressure which helps to ensure that sanity is maintained in society[153]. The rules of obligation acquire the character of law by their recognition as "primary rules." A regime of primary rules is a pre-legal society, suffering from three defects: defects of uncertainty, the defect of the static character of the rules, and the defect of inefficiency of the diffuse social pressure by which the rules are maintained.

These defects are corrected by the introduction of rules of recognition, rules of change, and rules of adjudication. This body of rules forms the core of "secondary rules" which translates the pre-legal system to a legal system. According to Hart, "the introduction of the remedy for each defect might, in itself, be considered a step from the pre-legal into the legal world; since each remedy brings with it many elements that permeate law: certainly all three remedies altogether are enough to convert the regime of primary rules into what is indisputably a legal system"[154]. According to Hart, therefore, law can be most illuminatingly characterized as a union of primary rules of

[151] Smith, J. C. *Legal Obligation*, p. 22.
[152] Hart, *The Concept of Law (Oxford: Clarendon Press, 1961). P. 80.*

[153] Ibid. *P. 85*

[154] p. 91

obligation with such secondary rules. In other words, primary rules acquire the character of a legal system through union with secondary rules.

Furthermore, Hart contended that obligation is explainable in words such as "ought", "obligation", "being bound", "having a duty" etc because of their connection to the internal aspects of the rules of law. In his words,

> *If we have an obligation to do something there is some sense in which we are bound to do it, and where we are bound there is some sense in which we are or may be compelled to do it"*[155].

In other words, it is because what we have the obligation to do, we ought to do, that obligations bind us. Given this interpretation, how then do we establish that a law creates obligation for us? In other words, following Hart's analysis, what is it that furnishes to our understanding, 'the ought' of law giving rise to obligation?

In his book "*The Concept of Law*" Hart states some factors that establish that an individual has the obligation to obey the law. Among these factors are: (i) the existence of social rules, making certain types of behaviour a standard; (ii) the distinctive function of such a statement is to apply such a rule to a particular person by calling his attention to the fact that his case falls under it[156]. But not all social rules create obligation for the individual. How then do we distinguish between those rules that create obligation and those that do not? Moreover, why does the rule apply to the person in question and why is it that it can be said that his case falls under such rules?

Hart explains further that a particular rule, say x, imposes obligation if and only if it has the following characteristics. One, if x establishes that there is social insistence for conformity; two, that x is necessary to the maintenance of social life; three, that x

[155] *Ibid* p. 104

[156]Hart, H.L.A. *The Concept of Law* Oxford: Clarendon Press, 1961, p. 83.

involves renunciation and sacrifice.[157] However, according to Hart, what furnishes to our understanding the oughtness of law is the idea of a social pressure. Those pressures create in the mind of the individual that the society insists that he should conform. These pressures, according to Hart, provide the ought of law.

Such obligations, Hart contends, are similar to obligations that arise out of promises. In both, there are meanings to the obligation created because of its "dependence on the actual practice of a group", therefore, there is "possible independence of content" and the use of coercion[158]. It may be asked, however, whether coercion is necessary in fulfilling an obligation arising out of promise, and by extended application, an obligation to obey the law. Hart thinks it does. It may also be asked whether the contents of such rules create a difference. Hart does not think so. For him, what matters is "the use of the procedure by the appropriate person in the appropriate circumstances"[159].

On a final note, the deduction we can make out of Hart's analyses of the obligation to obey the law is that which explains obligation in terms of the existence of rules i.e. laws. In line with Austin's view, Hart concludes that the 'oughtness' of obligation arises from social pressure which insists that the prescribed standard of behaviour as outlined in the existent social rules be conformed with. In actual fact, Hart has only succeeded in explaining how people view rules when they accept them as standards. He has not explained why they accept certain rules as guides for conduct[160].

What is important is to answer the question why it is that people consider that

---

[157]Ibid, *pp. 84-85.*

[158] Hart, H.L.A. "Legal and Moral Obligation" in A.I. Melden (ed.) *Essays in Moral Philosophy (Seattle: University of Washington Press, 1958), p. 103.*

[159] Ibid. p. 102

[160] J. C. Smith, *op. cit.* p. 28.

the law ought to be obeyed and should therefore be accepted by them as constituting a standard for their behaviour?[161] A correct analysis of the structure of ought language shows that the response "why" is often found to accompany every ought statement. So, if Hart meant to explain the oughtness of obligation in respect of the law, the explanation ought to take care of why it binds or why such laws are obligatory. This Hart did not give.

According to R.J. Bernstein, Hart's explanation was insufficient to demonstrate the difference between rules that create or impose obligations and those that do not. He gave an example of a standard which does not create obligation but nevertheless, attract severe social pressure on those who deviate[162]. Moreover, Hart's undue emphasis on social pressure as the binding force of obligation falls short of the claim that "people exert social pressure on others to comply because of the existence of an obligation" and that an "obligation does not exist because people apply social pressures"[163]. That people apply social pressure does not indicate that obligations exist. It is conceivable that people may apply social pressures and insist that a certain minimum standard of behaviour be conformed to without such standard raising a cogent element of obligation.

To salvage this defect, Hart introduces the internal point of view, as an attempt on the part of the officials to internalise those rules and in the process accepting them as rules worthy of being obeyed. This is what he described as the internal aspects of rules which entail "a critical reflective attitude to certain patterns of behaviour as a common standard." This "critical reflective attitude" is made known

---

[161] Ibid.

[162] Bernstein, R.J. "Prof Hart on Rules of Obligations", *Mind* vol. 73 (1964), p. 563. An example Prof. Bernstein gave is nakedness.

[163] J. C. Smith, *op. cit.*, p. 33.

through the following: criticism, (including self criticism), demands for conformity, and the acknowledgement that such criticism and demands are justified.[164]

The question however is whether this internal attitude i.e. the critical reflective attitude, is a moral affair or not. If this attitude is said to be meaningful in the light of self-criticism, demands for justification and what have you, then it can be said that we are treading on a familiar moral terrain. After all, the critical aspects of any theory of obligation consist in how that theory is able to furnish us with the ought of law. This ought, in a sense, is described from the ability and the opportunity to provide reasons and justifications for our actions. This is what Thomas Scanlon describes as the moral motivation to justify our actions.[165] But this is not Hart's submission. The internal point of view is not a moral point of view. In his words:

> *Those who accept the authority of the legal system look upon it from the internal point of view, and express their sense of its requirements in internal statements couched in the normative language which is common to both law and morals: 'I (you) ought', 'I (he) must', 'I (they) have an obligation'. Yet they are not thereby committed to a moral judgment that it is morally right to do what the law requires.*[166]

In order to determine the basis of his arguing thus, Hart's argument can be deciphered in the following that:

> *It is not even true that those who do accept the system voluntarily, must conceive of themselves as morally bound to do so...their allegiance to the system may be based on many different considerations: calculations of long term interests; disinterested interest in others; an unreflecting or traditional attitude; or the mere wish to do as others do. There is indeed no reason why those who accept the authority of the system should not examine their conscience and decide that, morally, they ought not to accept it, yet for a variety of reasons continue to do so.*[167]

From a critical point of view, it appears that there are many questionable moves involved in Hart's reasoning here. Assuming that all that Hart contended is a variety of reasons for accepting the authority of the law, it is surprising that Hart

---

[164] Hart, *The Concept of Law*, p. 56.
[165] Scanlon, T. M. "Contractualism and Utilitarianism" in *Utilitarianism and Beyond*, Sen, A. and Williams, B. (eds.), Cambridge: Cambridge University Press, 1982, pp. 103-128, at p. 116.

cleverly omitted the moral point of view even when it appears that his idea of internal point of view suggests the existence of a moral reason. Granted this postulate, we can cautiously assume and submit that Hart's whole agenda is an instance of what we may call *the replacism thesis,* or, in other words, *moral escapism* which is the view that as much as you can and as far as you can go, you should avoid the use of moral terminologies. In a nutshell, *replacism* thesis is an effort at avoiding a moral account of law. In fact, as Horton contended, "it is hard to see how someone could accept the law whilst deciding that, morally, they ought not to accept it. For if they think that they ought not to accept the law, then surely they will think that such demands and criticisms are not justified."[168] James Morauta, though a positivist himself, considers Hart's internal point of view, in the way it is elegantly described and excellently portrayed, as best understood as a moral point of view.[169]

One formidable and fundamental objection to Hart's descriptive positivism and hermeneutic approach to the nature of law, and in particular, the separability thesis, in the light of the Rule of Recognition is that offered by Ronald Dworkin. According to Hart, the Rule of Recognition comprises the basic criteria of legal validity within the legal system in question, such that a particular legal norm is only valid because it has been authorised by a moral general rule or basic legal norm, the Rule of Recognition. Going by this, the Rule of Recognition appears concerned with processes of legal validity without consideration of content.

According to Dworkin, Hart's Rule of Recognition fails to account for the legal status of some principles in some legal systems. Furthermore, Dworkin contended that the possibility of distinguishing principles which are part of a legal system from those

---

[166] Hart, *Concept of Law*, p. 199.
[167] Hart, pp. 189-199.
[168] Horton, Richard *op. cit.*, p. 605.
[169] Morauta, J. "Three Separation Theses" in *Law and Philosophy*, 23: 111-135, at p. 120, 2004.

that are not, through Hart's use of the Rule of Recognition, will be counter productive for Hart's theory of law. In that situation, the Rule of Recognition will not be able to perform the function Hart meant it to perform.[170]

In furtherance of his thesis, Dworkin was able to point out that rules alone, as highlighted in Hart's epistemology of law, are not all that makeup a functional legal system. Functional legal systems are also inclusive of principles and policies and other standards which make such systems to work and achieve the goal of justice and fairness in a given society. A principle, in the estimation of Dworkin, "is a standard that is to be observed...because it is a requirement of justice or fairness or some other dimension of morality."[171] Dworkin appears to have validated the presence of these kinds of principles in a given legal system by recourse to aspects of judicial decision making. According to Dworkin,

> *When lawyers reason or dispute about rights and legal obligations, particularly in those hard cases when our problems with these concepts seem most acute, they make use of standards that do not function as rules, but operate differently as principles, policies, and other sorts of standards. Positivism...is a model of and for a system of rules, and its central notion of a single fundamental test for law forces us to miss the important roles of these standards.*[172]

One particular area of importance which can be cited in the validation of Dworkin's critique of Hart's approach is in relation to the jurisprudential significance of the doctrine of judicial review. The doctrine of judicial review is a theory of constitutional law which states that a statute which does not conform to the commands and limitations of the constitution is utterly void and of no effect i.e. not binding. In this light, it follows that an occasional law of the legislative body or administrative action

[170] Dworkin, R. *Taking Rights Seriously*, Cambridge, MA: Hard University Press, 1977, pp. 39-45, 68-74.,
[171] Dworkin, R. "The Model of Rules" in *University of Chicago Law Review*, 35, 1967, p. 23.
[172] Ibid., p. 22.

will be declared unconstitutional meaning that "no duties are imposed by it; no rights can be founded on it; it furnishes no protection to those who undertake to obey it..."[173]

It is sometimes stated in positivists' circles that when the bindingness of law is spoken of, it is considered to give rise to obligations. In other words, that what a legal requirement, say a legislative enactment or law, give rises to are legal obligations which are held to be distinct from moral obligations. That means that those who support the view that obligations to obey the law are legal are in effect saying that the bare fact that something is enjoined or forbidden by the law is a necessary and sufficient reason for doing or refraining to do what that law states. That would mean that obligation to obey a law is independent of the content of that given law.

This argument in itself will corroborate the thesis of positivists not only that the Social Thesis is infallible but also that its derivative thesis, the Value Thesis, is equally infallible. Thus, a legal system is fully and utterly determined by social sources giving rise to the nature of law as deriving mainly from social facts. But then, if this is entirely true then it could be concluded that the jurisprudential significance of judicial review becomes questionable. It does mean that judges are rule-dependent when exercising the power of judicial review.

As a matter of fact, however, when judges exercise the power of review over legislative laws, what is emphasized is that the bindingness that arises out of legal requirements is not a sufficient reason for establishing that citizens have obligation to obey such laws or laws in general. The possibility of reviewing and setting aside legislative laws that infringe against fundamental human rights such as liberty of conscience, freedom of thought, freedom of association, freedom of occupation and choice of careers, political participation, freedom to pursue one's own plan of life is a

[173] Horace Davis, *op. cit.* p. 17

telling argument that obligation to obey the law is not just because the legal directive in question is a law.

In fact, to raise such argument would be to beg the question. If a law is said to give rise to obligations because it is the law, and if it is a possibility that such laws, regarding their content, are subject to review i.e. either being established as alright in terms of content or being set aside because the content is lacking in adequate consideration of fundamental rights, it follows that obligations that arise out of a legal directive are not simply ones of a legal type. They would be such that are derivative i.e. content-regarding. This is another way of saying that the idea of conformity of laws to a given or assumed standard is paramount in the whole enterprise of law-making. This, in plain language, is what judicial review in its essence and constitutional justification strives to establish and affirm. The jurisprudential implication is that a legal system is not built on law alone.

This, perhaps, was what Dworkin hinted at in his seminal objection to Hart's hermeneutic understanding of the idea of law and the nature of a legal system. The importance of the objection is that if, in material and experiential terms, a legal system is discovered that projects more than the Rule of Recognition that Hart spoke about, then, it means that positivists' analysis of law is in need of a revision which may seriously impugn positivism. A way out as suggested by Dahlman is the abandoning of the idea of the Rule of Recognition. In his words,

> *In recent years, philosophers who call themselves legal positivists have demonstrated a readiness to question every positivistic doctrine, except for the rule of recognition, and have been disagreeing about everything, with the exception of the doctrine of the rule of recognition. It appears as if it was the only thing left to hold on to for someone who wants to remain a legal positivist. Ironically, it is just the other way around. Legal positivism can only be saved from the post-Dworkin dilemma if it let go of this doctrine. The time has come to take the rule of recognition to the slaughter. The problem with the doctrine of the rule of recognition is that it seeks to provide a general*

> *theory of legal recognition, and therefore overlooks the fundamental difference between adjudicative and epistemic recognition.*[174]

Hart's posthumous published rejection of Dworkin's attack on the Rule of Recognition[175] provided the impetus for the evolution and development of an inclusive thesis on the criteria for legal validity and, importantly, a perennial division in contemporary legal positivism on the Social Thesis and the Value Thesis i.e. the Separation Thesis to which we immediately turn.

2.3.3.6 POST-HARTIAN POSITIVISM AND THE SEPARABILITY THESIS

The freshness that contemporary legal positivism adds to the separability thesis can be described in the words of Bix as a series of elaborations, emendations and clarifications of H. L. A. Hart's normative positivism.[176] That freshness can be defined as a reformulation and reworking of the defects and missing details in Hartian positivism. The nature of the reformulation can be seen in the evolution of two main traditions in contemporary positivistic thinking on law, and particularly, the separability thesis. These two main traditions are inclusive legal positivism and exclusive legal positivism. Earlier, we had hinted at the different ways in which both traditions have conceived the relation between law and morality.

According to Daniel Priel, the evolution of these two schools of thought on positivists' separability thesis is not just traceable to Hart's reformulation of the tenets of legal positivism in the postscripts but also in Dworkin's devastating critique of Hart and other positivists' position on the separability thesis. In the words of Priel,

> *The beginnings of the debate between exclusive and inclusive legal positivists can be found in the responses offered by different theorists to Dworkin's arguments against legal positivism. Very roughly, Dworkin argued that morality plays an essential and non-discretionary role in legal reasoning, and*

[174] Dahlman, C. "Adjudicative and Epistemic Recognition", *Analisi e diritto 2004*, a cura di P. Comanducci e R. Guastini, p. 232.
[175] This rejection and an acceptance of the inclusive thesis of legal validity is contained in Hart's "Comment on Dworkin" in *Issues in Contemporary Legal Philosophy*, Oxford Clarendon Press, 1987, pp. 35-42; also in Hart *The Concept of Law*, 2nd edition, Oxford: Clarendon Press, 1994, pp. 250-54, 259-268.
[176] Bix, B. *op. cit.*, p. 32.

from that it follows that at least some moral standards are necessarily part of the law. In addition, he argued that since these moral standards are not part of the law as a result of some 'pedigree' test, positivism is false.[177]

Exclusive positivists talk of separation thesis, while inclusive positivists talk of separability thesis. Our contention is that as long as the division between the 'hard positivists' and 'soft positivists' is maintained and made to linger on the interpretation and elaboration of one central point of legal positivism which is that there is no necessary connection between law and morality, it suggests to us the possibility of defining positivism as a non-single and non-unified theory of law. The question then is: what is the meaning of hard and soft positivism and what is the implication of both traditions with respect to the separability thesis?

2.3.3.6.1 EXCLUSIVE (HARD) LEGAL POSITIVSM AND THE SEPARATION THESIS

According to James Morauta, the thesis of exclusive legal positivism is the view that for any possible legal system, the rule of recognition in that system contains only non-moral criteria.[178] Thus, the existence of any legal system is not sympathetic to or cognisant of morality. This interpretation of legal positivism is often said to derive from positivists' initial position on the nature of law. This is what some positivists regard as the Social Thesis which is the view that what counts as law in any given society is a matter of social fact. According to Horton, positivists understanding of the Social Thesis consist in the view that "the question of what the law is in any given society ultimately reduces to questions of social facts, i.e. facts concerning the existence of institutions within the society, and the behaviour and attitudes of the members of the society."[179]

At first glance, this thesis is not a conceptual one; rather, it is a descriptive, empirical contention. The truth or falsehood of this contention will doubtless lie not in

[177] Daniel Priel, "Farewell to the Exclusive-Inclusive Debate", Internet Material
[178] Morauta, J. *op. cit.*, p. 117.

conceptual verification but in an empirical one. However, it might be contended that just a single instance of a legal system in which moral considerations serve as the criterion of legal validity reduces the claim of exclusive positivism to absurdity. According to Waluchow,

> *Exclusive positivism, in both its conceptual and descriptive forms, is falsified by the existence of legal systems in which determinations of law sometimes depend on moral factors. It is perhaps worth noting that even if it were true that there were no such systems, this would not invalidate or falsify the conceptual version of Inclusive positivism."*[180]

The implication of exclusive legal positivism is the view that the social thesis cannot be accepted without a rejection of the essence of moral obligation as a factor in the obedience of law. In other words, it does not follow whether laws are obeyed by citizens; legal obligation does not give rise to moral obligation. In other words, it shows that legal obligation is all that is needed to create the ought of law; hence, moral obligation is of no consequence to legal obligation. That is, the basis of obligation to law stems from law, and not from morality.

Thus, what exclusive positivists deny by recourse to social facts is that legal obligation entails moral obligation. The meaning we can derive from exclusive positivism is the view that necessarily, law and morals do not coincide in a legal system. Thus, for hard positivists, a legal system does not need and is not built on any moral foundation. Law and morality are therefore separable. The implication of the separability thesis, from the eye of hard positivism, is the view that there exists a possible legal system such that the truthmakers for the legal proposition contained in that system are nothing but social facts.

Better still, hard positivists on the separation thesis affirm that for any possible legal system, the truthmakers for the legal propositions consist exclusively of social

---

[179] Horton, R. *op. cit.*, p. 609.

facts. In contemporary legal positivism, exclusive positivism is notably and principally identifiable in the thoughts of Joseph Raz. Other exclusive positivists are Scott Shapiro,[181] Andrei Marmor,[182] and Brian Leiter.[183] The intellectual contribution of Joseph Raz will serve as the litmus tests for understanding and appraising the doctrine of positivists' exclusivism.

In line with ancient and contemporary legal positivists', Joseph Raz's treatment of the doctrine of legal positivism takes off from a thorough consideration of the nature of law. It is from this point that Raz arrived as his notion of separation. According to Raz, an understanding of law will have to take account of the fact that law is a social fact. Raz contended that "the existence and content of every law is fully determined by social sources".[184] The implication or meaning is that moral criteria can neither be sufficient nor necessary conditions for the legal status of a norm.

A possible worry over the claims of exclusive positivism is whether it is able to sustain the argument that moral criteria are not necessary and sufficient conditions for the legal status of a norm. This worry is highlighted in the face of facts where, in some societies, part of the social sources Raz hinted at are indeed moral facts and values. It could be argued that positivists' exclusivism is bound to fall just in case it is possible to cite an example of the indispensability of moral criteria in the idea of legal validity. Morauta hinted at the possibility of such a situation. According to him, to define law as fully determined by social sources depends on what is meant; and what is meant could be broadened to include, in social sources, moral criteria.

---

[180] Waluchow, W. "The Many Faces of Positivism" *University of Toronto Law Journal*, XLVIII, No. 3, 1998, p. 7.
[181] Shapiro, S. "On Hart's Way Out" in *Legal Theory*, 4 (1998): 469-508.
[182] Marmor, A. "The Pure Theory of Law" in *Stanford Encyclopeadia of Philosophy*, E. N. Zalta (ed.), <http://plato.stanford.edu/archives/win2002/entries/lawphil.theory, 2002.
[183] Leiter, B. "Realism, Hard Positivism and Conceptual Analysis", in *Legal Theory*, 4 (1998): 533-547.
[184] Raz, J. *The Authority of Law*, Oxford: Clarendon Press, 1979, p. 46.

This meaning, however, according to Morauta can be established only as a *conjunctive thesis* since the initial, original position on the sources of law is still maintained. But can this be seen as inconsistent with the claims of exclusive positivism? Our observation is that, sometimes, the possibility of such detection consists in what our understanding of exclusive positivism is.

What then is the *conjunctive thesis* and what is its consequence for the Value Thesis or separation thesis? The *conjunctive thesis* was adopted by Morauta to establish a note of triumph for positivists' position on the separation thesis. But this is, however, possible if and only if the conjunctive thesis is formulated derivatively, and not, definitionally. The Social Thesis and the conjunctive thesis affirm the position that laws can still be argued to be social facts although those facts include moral values which are part of the social facts prevalent in that society.

The conjunctive thesis sounds consistent with positivists' Social Thesis if it is formulated derivatively. The derivative argument for the Social Thesis will then mean that "moral premises P1, P2 ...Pn are true and such that: the social facts which are the truthmakers for legal propositions entail - in conjunction with true premises including P1, P2 ...Pn - that laws necessarily have moral value."[185] Once this is so, argues Morauta, positivism can be defended along the line of the Social Thesis.[186] In other words, the conjunctive thesis rather than serve as vitiating the validity and consistency of the Social Thesis may end up strengthening it.

If the argument on the moral dilemma of positivism has done nothing, it has, at least achieved the objective of drawing the attention of jurisprudence and its admirers to the view that one of the interesting dimensions of the nature of law is its connection to one of the normative institutions of human society - morality. Again, the

[185] Morauta, p. 126.
[186] Morauta, p. 126.

achievement of the argument on the morality of law consists also in the fact that, in contemporary times, there is an acknowledgement of the dilemmatic nature of legal positivism with respect to the unsettled question of the connection between law and morality either in relation to the Social Thesis or the Value Thesis or both.

Even though the argument by Morauta may sound convincing, a positivist like Joseph Raz is bound not just to have problems with this understanding of the Social Thesis but also in rejecting it altogether. According to Raz, understanding the Social Thesis along the line of the conjunctive thesis is to sound like a naturalist. For Raz, there is a clear cut difference between moral premises for law and what are distinctive legal premises. When the Social Thesis is mentioned, argues Raz, what is argued to be important for law and legal systems is that laws are fully sourced in social facts and those facts are basically legal premises.[187]

In fact, Raz argued that the thesis of inclusive positivism is bound to fail in the sense that if legal rules are pre-emptive reasons or exclusionary reasons, there is no reason why moral values will be brought to play.[188] According to him, legal rules and their nature, particularly their content, are ascertainable without recourse to moral evaluation. One substantial objection to Raz here is that law just on its own may not be enough to induce citizens to action or obedience. This is because law appears to draw from a whole lot of reasons for inducing citizens to action. The case of the conscientious objector to the law is also of importance in this regard, as well as the law's admittance of extenuating circumstance in judicial-decision making. What also do we say about constitutional limit in terms of content brought to bear in the administration of law and its enforcement? These are realities within a consideration, interpretation and understanding of law in most legal systems.

[187] Raz, J. *Practical Reasons and Norms*, London: Hutchinson, 1975, p. 166.
[188] Raz, J. *Ethics in the Public Domain*, Oxford: Clarendon Press, 1994, pp. 199-204.

Raz could reject these possibilities as having any fundamental importance in the understanding of the science of laws. The nature of law makes it unnecessary to seek to understand what law is from the perspective of what law is meant to provide authoritative opinions on. To start raising the connection of law with morals is to make an attempt to miss out of the nature of law what is critically important in understanding the law which is the fact that a regime of laws or a legal system is a justified practical authority. Thus, in his words, those subject to an authority such as law "can benefit by its decisions only if they can establish their existence and content in ways which do not depend on raising the very same issues which the authority is there to settle".[189]

The acceptability of Raz's argument above only shows the prodigality of inclusive positivism right from the outset. The need for an inclusive thesis all along was bound to fail. However, if an endorsement of inclusivism in contemporary positivism is an incredible instance of prodigality, what is curious in the consideration of contemporary legal positivism is when the prodigality is found in the source. Since the source is said to provide the original position, it may serve us better if the statement of exclusive positivism is reconsidered; for in it may be found the prodigality it has found in others.

Raz's exclusivism has been attacked in the following ways: one, it is true that legal rules are meant to be authoritative and indeed they are, but that even at that the content of legal rules and legal systems may be determined in part by moral reasons;[190] two, according to Jules Coleman, the possibility of a distinction between moral criteria for legal validity and moral reasons that apply to citizens in a given

[189] Ibid., p. 219.
[190] Waluchow, Wilfrid *Inclusive Legal Positivism*, Oxford: Clarendon Press, 1994, pp. 129-140; see also Waluchow, "Authority and the Practical Difference Thesis: A Defence of Inclusive Legal Positivism" in *Legal Theory*, (2002) 6, pp. 45-82, at pp. 47-71.

system renders unworkable the claims of Raz that the authority of law is justified practical authority.[191]

A more fundamental objection to Raz's exclusivism was offered by Jeff Goldsworthy. According to Goldsworthy, Raz's conception of law and legal systems as justified practical authority, in the sense that officials of a legal system see that they are morally bound to enforce the law on citizens from an internal point of view, is self defeating. Raz had argued that when legal officials view the law and the obligation that stems from it, there is a sense in which they often believe that such legal obligations are morally binding.

But though they believe this, they often do not think that that is the way in which legal obligation is to be held. This is true, according to Raz, in the sense that "it may be that all they state is that certain relations exists between certain people and common legal sources or laws. Their belief that those relations give rise to (moral) obligations may be quite separate and may not be part of what they actually say when asserting obligations according to the law."[192] In another passage, Raz also tended to show a bit of inconsistency in the whole argument of exclusivism. This is what we can call 'the legal officials, the law and the pretence' thesis.

The pretence thesis, given an understanding of Raz, seems to be this: a legal system, exists not just because the officials believe in the moral justification of law, but when they pretend to show that the legal system is justified, in a moral way.[193] Pretence, however, is far removed from reality. A legal system is not built on pretence. Moral statements, if they form part of a legal system, have one credit of providing a sure foundation of justice for the system so constructed. As a matter of

[191] Coleman, Jules *The Practice of Principle: in Defence of a Pragmatist Approach to Legal Theory*, Oxford: Oxford University Press, pp.125-127.
[192] Raz, J. "Hart on Moral Rights and Legal Duties" in *Oxford Journal of Legal Studies*, 4 (1984), pp. 123-131, at p. 131.

fact, if legal statements are moral statements, argues Holton, then, since such judges will be in no position to sincerely utter moral statements, they will be in no position to sincerely utter legal statements. They will be simply pretending to make legal statements. But then we will just have a pretend legal system; not a real legal system underpinned by moral pretence.[194]

In the same vein, Raz seems to be engaged in an endless shifting of ground on what the connection between law and morality is, asserting in one passage the moral justification of law and legal system and in another contending that such moral justification are justifications that law provides, institutionally for itself. According to Jeff,

> *Raz depicts law as a system of norms whose identification is purely a matter of fact, but which those adopting the internal point of view accept as morally binding on themselves and others subject to them. In this way he reconciles the two aspects of law - the factual and the normative...but how can this be so...? If norms whose existence is a matter of social facts alone are thought to give rise to genuine moral rights and duties, those social facts must be thought to possess some necessary and not merely contingent moral value. (Which is to say that from the internal point of view the positivists' moral thesis is false.)*[195]

One rebuttal against Jeff's criticism of Raz's position is to argue that Raz was not shifting grounds at all but only insisted that if laws are to be ascribed any moral justification, they derive that moral justification in the systemic way i.e. legal system are, institutionally, morally justified. It is in this kind of institutional settings that particulars laws gain their moral merit and value, such particular laws still counting and held as social facts and not necessarily moral facts. This rebuttal is akin to a similar argument raised in favour of positivism by Holton called 'the moral attitude constraint' which is the view that officials in a given legal system must take a moral attitude towards the law. The statement of the moral attitude constraint consists in

---

[193] Ibid., p. 130.
[194] Holton, "Positivism and the Internal Point of View", p. 614.

the following proposition: if it is a law in S that P, then the officials of S must believe that they are morally justified in enforcing the requirement that P, and that the subjects of S are morally obliged to conform to it.[196]

However, we tend to adopt the view, quite contrary to Holton's observation, that some kind of fallacious reasoning is involved in both arguments. If we flesh out in greater details the statement of the moral attitude constraint, we shall find some absurdities still contained in it. Suppose we accept that a system is indeed morally sound and good, does that preclude us from engaging in a moral appraisal of each particular law? If we understand Holton's views, the answer will be that officials of that system will still feel they are morally obliged to enforce that particular law simply because the law, though bad, is existing in a system that is overall good.

We tend to think such kind of logical move is contrary to the principle of sound, critical reasoning. This is because even if a system is good overall, it still does not follow that particular laws derive instant moral justification by virtue of the fact that the whole system is good. To engage in this kind of reasoning is to be guilty of the fallacy of division, taking the parts for the whole or taking the whole for the part. An example to show the absurdity of Holton's claim could be this: the army is an efficient body therefore every member of the army is efficient. It, however, does not follow.

What Holton fails to do is to distinguish the whole from the part. Both are not identical. In Holton's words, the officials "might think that there is a systemic moral justification for obeying and enforcing bad laws, up to a certain point."[197] What Holton has failed to distinguish is what we have called the demand, independently, for a general appraisal and specific appraisal. We think the moral attitude constraint does

---

[195] Goldsworthy, J. "The Self-Destruction of Legal Positivism," in *Oxford Journal of Legal Studies*, 10 (1990), pp. 449486, at p. 462.
[196] Holton, *op. cit.*, p. 607.
[197] Holton, p. 608.

not really do justice to the charge of inconsistency simply because to admit that the internal point of view is a moral attitude is not to deny that laws do not have moral foundations and dimensions. In this sense, exclusivism has not been able to dismiss the necessity of moral reasons as the moral obligation officials have towards the acceptance of laws. If they accept the system in such a way, it can be argued that they do not accept the law just because it is the law, but by internalising the demands to conform to the law and its enforcement in a morally binding way.

The general conclusion on the appraisal of exclusivism is that law is a cultural and social institution. Their intelligibility and meaningfulness can be deciphered by the fact that they incorporate certain values which make the officials constrained in a moral way in enforcing and implementing them. The basis for acceptance may not necessarily be moral criteria of validity. However, there could be an implicit acknowledgement of the moral quality of the ends of law. This important point was stressed by Neil MacCormick when he reasoned that

> *It is as true of law that justice and the promotion of public good within the constraints of justice are the particular goods that make it intelligible to us as a congeries of institutions and practices ...It is thus the case that laws we judge unjust or detrimental to the public good are on that very account laws that we judge essentially defiant examples of the genus to which they belong, even though we may also judge them to belong validly to that genus.*[198]

How this thesis and conclusion is envisioned in the thesis of inclusive positivism is what is to be argued out in the next section to which we turn.

2.3.3.6.2 INCLUSIVE (SOFT) LEGAL POSITIVISM AND THE SEPARABILITY THESIS

While the thesis of exclusive positivism consists in the view that laws do not necessarily produce or satisfy the demands of morality, inclusive positivism hacks on the fact that it may be argued that laws reproduce certain demands of morality. The basis for the development of inclusive positivism consists in the moral dilemma which

Hart's notion of the internal point of view tended to have led the entire legal positivists movement. Thus, the basis for the adoption of inclusive legal positivism consists, on one hand, the Hartian rejection of the Value Thesis which states that laws do not necessarily have moral value[199] and a later acceptance of the Moral Value Thesis which is the view that laws necessarily have moral value.[200] In the second instance, inclusive positivism is based on the explicit implausibility of exclusive legal positivism as outlined above. According to Jose Juan Moreso,

> *ELP provides an unsatisfactory picture of the law. Provided that constitutions in contemporary democracies often resort to moral standards, judicial discretion would be, in these cases, quite pervasive. Therefore, it might seem preferable to work out, if possible, some different, though plausible, interpretation of the Hartian legal positivism theses.*[201]

How best do we then understand the thesis of inclusive positivism? A number of scholars, within the positivists' tradition, have pledged their unflinching support for legal positivism while at the same time admitting what Michael Stocker regarded as a kind of schizophrenia of positivist legal theory. Notable among inclusive legal positivists are Jules Coleman,[202] Wilfrid Waluchow,[203] Philip Soper,[204] David Lyons,[205] and H. L. A. Hart himself.[206]

Proponents of inclusive legal positivism hold very different interpretations of the separability thesis while not detaching themselves and their views from the spirit of positivism. But the question is whether an acceptance of different interpretations

---

[198] Neil MacCormick, "Natural Law and the Separation of Law and Morals" in *Natural Law Theory Contemporary Essays*, edited by Robert P. George, Oxford: Clarendon Press, 1992, pp. 105-133, at p. 113.
[199] Morauta, J. *op. cit.*, p. 124.
[200] See Hart, *Concept of Law*, 1994, pp. 206-207.
[201] Moreso, Jose Juan "In Defense of Inclusive Legal Positivism" in Paolo Comanducci (ed.) *Analisi e diritto* (yearbook), Genoa, 2000.
[202] Jules Coleman, "Negative and Positive Positivism" in *Journal of Legal Studies*, 11 (1982), pp. 139-164; "Incorporationism, Conventionality and the Practical Difference Thesis" in *Legal Theory*, 4, (1998), 381-426; *The Practice of Principle: In Defence of a Pragmatist Approach to Legal Theory*, Oxford: Oxford University Press, pp.125-127.
[203] Waluchow, Wilfrid *Inclusive Legal Positivism*, Oxford: Clarendon Press, 1994, pp. 129-140.
[204] Soper, P. "Legal Theory and the Obligation of a Judge: The Hart/Dworkin Dispute" in *Michigan Law Review*, 75 (1977), pp. 473-519.
[205] Lyons, D. "Principles, Positivism, and Legal Theory" in *Yale Law Journal*, 87 (1977), 415-435.
[206] Hart, H. L. A. *The Concept of Law*, 2nd edition, Oxford: Clarendon Press, 1994, pp. 250-54.

of the separability thesis is consistent with what is regarded as the true spirit of positivism. It might also be asked whether inclusivism is consistent with positivism. What is regarded as excellently capturing the spirit of positivism is the Social Thesis which is the view that law is a product of social facts, or, as pungently expressed by Torben Spaak, that what is law and what is not is a matter of social fact.[207]

Whether inclusivism is consistent with that general positivist's spirit given different interpretation of the separability thesis is what is of urgent concern to us. A denial, however, of the Social Thesis, apart from reducing the force of appeal of the separability thesis, also has the added goal of reducing inclusivism to a status of jurisprudential redundancy. This can only be established by a thorough consideration of what each of these authors has to say in their expression of inclusivism.

Waluchow and Coleman can be regarded as holding what may be called the particularistic thesis against the separability thesis. According to inclusive positivism, it is possible that there exist some particular legal systems in which the criteria of legal validity include moral ones. If this is correct, then it falsifies the separability thesis that moral factors are not part of the criteria of legal validity. Thus, particular legal systems may exhibit some moral criteria in the definition of law. Thus, it is not as if there is a necessary relation between law and morality; neither is it true that there is a moral content to a legal rule. As defended by Waluchow,

> *Philosophers like Jules Coleman, John Mackie, and David Lyons have suggested that among the conceivable connections between law and morality that a positivist might accept is that the identification of a rule as valid within a legal system, as well as the discernment of the rule's content and how it bears on a legal case, can depend on moral factors. On this view, which we have called inclusive legal positivism, moral values and principles count among the possible grounds that a legal system might accept for determining the existence and content of valid laws...Despite a noticeable trend among positivists toward accepting that law and morality can be connected as inclusive positivism suggests, there are clear exceptions*[208].

[207] Spaak, Torben "Legal Positivism and the Objectivity of Law" in *Analisi e diritto 2004*, a cura di P. Comanducci e R. Guastini, p. 257.
[208] Waluchow, Wilfrid *Inclusive Legal Positivism*, Oxford: Clarendon Press, 1994, pp. 81-2.

If this is what inclusive positivism asserts, it shows that this assertion is only possible where there is a distinction between the grounds and content of legal validity. According to Christian Dahlman, inclusive legal positivism rests on a distinction between the *grounds* and the *content* of the criteria of legality. The grounds of the criteria must be a social fact (a convention among officials), but the criteria themselves need not *state* social facts.[209]

Juan Jose Moreso, in agreement with Hart's revision considers inclusivism as a plausible doctrine of positivism. For him, inclusive positivism is a revision and a reformulation of what is supposed to be the defects and implausibility of exclusive positivism. Juan Jose Moreso's statement is therefore, according to him, a different, though plausible, version of the Hartian interpretation of positivism. This plausible and revised version of positivism, according to Moreso, consists in the following postulations:

(1) The Social Source Thesis: the existence and the content of the law in a certain society depend on a set of social facts, i.e., on a set of actions by the members of such a society, which may contingently resort to moral standards, making them legally valid;

(2) The Separability Thesis: It is not necessarily the case that the legal validity of a norm depends on its moral validity;

(3) The Limits of the Law Thesis (or the Discretion Thesis): At least in some of the cases where the law resorts to morality, it clearly regulates certain behaviours and, accordingly, it does not confer any discretion to the judges.[210]

[209] Dahlman, C. "Adjudicative and Epistemic Recognition", *Analisi e diritto 2004*, a cura di P. Comanducci e R. Guastini, p. 235.
[210] Moreso, Jose Juan "In Defense of Inclusive Legal Positivism" in Paolo Comanducci (ed.)

Evidently, the push and pull of the jurisprudence of inclusive positivism is the wholehearted acceptance of Dworkin's criticism's of Hart's Rule of Recognition that the criterion of legal validity is a completely legal affair. What is in need of clarification on the inclusivists' thesis is whether morality provides necessary grounds or sufficient grounds for the legal status of a norm. At one glance, it appears that what some positivists of the inclusive order are postulating is that morality appears to be sufficient grounds for the legal status of a norm. Cases in common law are often cited in which it is admissible that moral principles play a large role. This is where inclusive positivists borrow a leaf from the works of Ronald Dworkin whose criticism of legal positivism had earlier been alluded to. For inclusive positivists, still, it is possible to contend that in some legal systems, a legal norm is justified only or primarily for moral reasons, for example, where it is the case that morality requires the justification of a new law when judges decide on a case.

On the other hand, some inclusive positivists are prone to argue that morality is still not necessarily connected with morality. It may be stated as a necessary but not sufficient condition for legal validity. Examples are often drawn in the area of judicial review of legislative acts where an enactment that is found unconstitutional, based on moral reasons, are declared null and void. Such instances, some inclusivists would contend, establish that moral merits constitute a necessary condition but not a sufficient condition for legal validity.

For an external observer to fully appraise what is at stake in the diverse interpretations of the standing thesis of inclusive positivism, it appears a valid claim that we must juxtapose inclusivism as here stated with exclusivism. One advantage of this juxtaposition, may well be, perhaps, that one of the two traditions is mistaken

---

Analisi e diritto (yearbook), Genoa, 2000.

about what the real nature of positivism is. In fact, the many cases of revisionism and disagreement between inclusive positivists and exclusive positivists, and among positivists generally on the relation between law and morality compels one to conclude that legal positivism is, perhaps, the most inconsistent and ambiguous legal theory.

What is at stake between exclusivism and inclusivism seems to be this: exclusivism believes that moral merit does not count as a factor in legal validity. Thus, the objection of exclusivists is not that judges may declare new law on moral merit. What exclusivists deny is the view that "something is currently valid law because of its moral merit." The exact opposite appears to be the contention of inclusive positivists. Therefore even though both exclusivism and inclusivism accept the Value Thesis or more popularly called, the separability thesis, the exact language in which this is expressed shows a whole lot of, not just contradictions in the affirmation of the separability thesis, but also inconsistencies.

For example, the inclusive thesis agrees to the fact that morality counts as part of the conditions, either as necessary or sufficient, for legal validity in a legal system. Their insistence is that the use of moral criteria is contingent not necessary, and as such, limited to the roles that legal officials assign to such use in a given legal system. The meaning is that such a use does not reveal morality as part of the nature of law. Since it is not part of the nature of law, then it cannot be for all legal systems. This is why Dahlman contended that the disagreements between inclusive and exclusive positivists' "are just a disagreement over words. It is not a disagreement about the role of social facts in adjudication."[211]

[211] Dahlman, C. *op. cit.*, p. 237.

Now, if this reasoning is true of inclusive positivism, it might be a correct assertion that there is an element of question-begging in this analysis. If we truly understand the nature of the debate, it appears rather clear that what is at stake is the true nature of law and what has led to the consideration so far is the undecided dispute, even as a jurisprudential debate, on what the nature of law is. The question then is what is law? Positivists' assertion on the definition of law and the nature of law in general has been as unsettled as ever. The ambiguity of the separability thesis is therefore obvious, argues Füßer', and has the added consequence of providing an inadequate definition of law that does not serve the practical purpose of stating which social situations are properly called legal.[212]

While it is believed that the Social Thesis is shared by all legal positivists, what has been of interest is that what the constituents of the social facts are have been held to be diverse, of which one could be the moral facts or conventions of a given society. If we then go by inclusivism's analysis, such analysis continues to raise more difficult questions regarding what positivism actually means and what it intends to achieve. We may, however, say that it rather shows the uncertain nature of what the contenders of legal positivism actually mean and want to achieve with their theory, for the numerous epicycles of what it means confirm this suspicion. As rightly put by Bix,

> *The problem is that the defenders of legal positivism may have become too clever for their own good. With all the intricate modifications, clarifications, and addenda, the positivists may have won the battle but lost the war. The theory may be able to beat off all attacks, but the fortified product is one that sometimes seems to be neither recognizable nor powerful.*[213]

In precise terms, four identifiable arguments have been levied against inclusive legal positivism apart from the general ones adduced above and attempts have been

---

[212] K. Füßer, 'Farewell to Legal Positivism' in R.P. George, ed., *The Autonomy of Law: Essays on Legal Positivism* (Oxford: Clarendon Press, 1996) 119 at 120

made on the part of proponents of inclusive legal positivism to defend the position of inclusive positivism. These are the controversy argument, the collapse argument, the authority argument and the practical difference argument.[214]

The controversy argument against inclusive legal positivism states that moral facts are not objective facts. Moral standards are often most of the times controversial. To anchor the rule of recognition on such non-objective standards will be counter productive since it would have defeated the purpose for which the rule of recognition, in Hart's jurisprudence, meant it to serve which is to remedy the defects associated with a regime of primary rules. The best option for inclusive positivism is to adopt the position of moral objectivism.[215]

One implication is that the move towards moral objectivism will render utterly superfluous Hart's rule of recognition. Besides, if adopted, moral objectivism reduces the positivistic flavour inherent in legal positivism and particularly the inclusive version as a jurisprudential theory that advocates neutrality in the description of legal systems and analysis of the nature of law. The options available to inclusive positivism, in the light of this argument, if not a false dilemma, is either to reject the claim to neutrality and endorse moral objectivism or abandon the thesis that, in some sense, moral standards are germane to the analysis of law or as criteria of legal validity just like exclusive positivism. If the latter is adopted, it reduces the inclusivism or softness of this brand of positivism, hence a relapse to exclusivism. If the former is adopted, then it whittles away the positivist flavour and could end being

---

[213] Bix, *op. cit.*, pp. 38-39.

[214] For a comprehensive analysis and the defence of these arguments against inclusive legal positivism, Moreso Juan Jose's article "In Defence of Inclusive Legal Positivism" can be consulted on the site: http://www.upf.edu/dret/filos/positivismoeng.pdf

[215] Eleni Mitrophanous, 'Soft Positivism' (supra n. 16), pp.635-7; Philip Soper, 'Two Puzzles from the Postscript', *Legal Theory*, 3 (1998), p. 365; Susanna Pozzolo, 'Riflessioni su *inclusive* e *soft positivism*' in Paolo Comanducci and Riccardo Guastini (eds.), *Analisi e Diritto 1998. Ricerche di giurisprudenza analitica*, p. 240.

a version of naturalism. This is a dilemma that inclusive legal positivism is plagued with and attempts have been made by proponents to counter the objections of the controversy argument.

The second argument against inclusive legal positivism is what Moreso Juan Jose calls 'the collapse argument'. 'The collapse argument' is the view that inclusivism is not truly reflective of what positivism really entails. In other words, the argument against inclusive legal positivism is the view that what is inclusive or soft in inclusive legal positivism is a betrayal, an admission of a thesis or belief, which is antithetical to true positivism. In this sense, it is really an unstable theory of positivism since it flatly exaggerates and accepts what positivists in general deny and affirm, which is the divorce between law and morality. The divorce used to be the standing thesis that unites positivists but the division amongst positivists on the matter has further heightened the dilemma of legal positivists in present jurisprudential disquisitions. The collapse argument captures the heart of what we have branded as the "prodigality of inclusivism" in our own estimation and appraisal of inclusive legal positivism.

The third criticism against the theory of inclusive legal positivism is 'the authority argument'.[216] Simply stated, the argument states that law creates distinctly legal obligations which are completely distinct from moral obligations. These obligations are derived from law's claims and exercises of a measure of authority and legitimacy as a social institution. The authoritative nature of legal systems and

---

[216] Joseph Raz, *The Morality of Freedom*, Oxford: Oxford University Press, specially, chs.. 2-3 and 'Authority, Law, and Morality' in *Ethics in the Public Domain*, Oxford: Oxford University Press, 1994, 194-221.

institutions ascribes in turn a kind of moral legitimacy on law and the legal obligations which are entailed therein.

This distinguishes law from morality and, to that extent, creates a divorce between law and morality. This is because law as a product of such authoritative institutions rule out exclusionary reasons for action. Usually, as humans there are scales of priority in the balance of reasons for actions. But then, since law is a product of authority, such authority that backs law and makes a demand excludes other reasons as basis for action. In essence, law is a product of social facts which can be established without resort to moral standards or facts. The moral authority of law confers justification on law and a legal system as such.

The fourth argument against inclusive legal positivism is 'the practical difference argument'. The heart of the argument runs thus: according to Hart, legal norms have to be able to make a practical difference, that is, to affect motivationally the structure or the content of a subject's deliberation and action. It is enough that legal directives be able to motivate judges in the application of the law. By adding the standards of morality, this will not create a practical difference because judges may end up not being motivated by such standards. Thus, legal directives should not reflect nor resort to moral considerations since they do not create any difference for criteria of legal validity.

The implication is that where law is made to appeal to morality, there is no practical difference that it makes in the entire legal system. From this point of view, inclusive positivists' insistence that some moral standards are needed in a legal system is self defeating since, in the actual sense, it will amount to nothing. In the words of

Carlos Nino, "the appeals of law to morality are superfluous" [217] and, therefore, the only plausible conception of law, as an instrument making a "practical difference", is exclusive legal positivism. As a theory of law, exclusive positivism will be found more plausible since it asserts the independence of law from moral considerations. Inclusive legal positivism should therefore be abandoned.

It is important to note that each of these arguments against inclusive legal positivism have and are been challenged and attempts made to provide answers to them. For example, Moreso Juan argues that the controversy argument is misconceived in as much as it misconstrues moral realism for moral non-cognitivism.[218] Thus, as emphasized by John McDowell, sometimes "there is some conceptual room for cognitive antirealism."[219] Whether this response and many others are satisfactory or accepted is still a controversy in inclusive and exclusive positivists' circles. What is important, however, for our consideration is not so much the answer but the fact that the moral questions seem to exhibit the paradoxicality inherent in positivists' jurisprudence.

2.3.3.7 POSITIVISM TODAY AND THE ETHICAL QUESTION

The depth of dissatisfaction and difficulty in exhaustively defending the separability or separation thesis beyond the attacks of critics and opponents has contributed to the search for alternative answers on the part of positivists on the morality issue or question in relation to the criterion of legal validity. From the whole train of debate over the law and morality question, one vital issue appears certain which is that positivists' have acknowledged that to banish normative considerations, especially morals, from the definition and characterisation of the nature of law, legal

---

[217] Carlos S. Nino, *The Ethics of Human Rights*, (Oxford: Oxford University Press, 1991), Appendix vi, pp. 394-5.
[218] Moreso, J. J. *op. cit.*, p. 7.
[219] John McDowell, 'Values and Secondary Qualities' in Ted Honderich (ed.), *Morality and Objectivity*, London: Routledge & Kegan Paul, 1985, pp. 110-129.

validity, legal obligation and such other related concepts, from the vocabulary of jurisprudence is somewhat an uneasy, if not impossible, task.

In the light of this, positivists' geniuses have been developed in the evolution of ideas that will express better the substance of positivism in the light of the quagmire of unrelenting questions on the connection between law and morality or on the best possible way of advancing the separation thesis. In recent times, Tom Campbell has developed a view called "ethical positivism." Other theses in this light are the following: Fallibility Thesis and the Neutrality Thesis, with the latter containing some added components such as the Neutral-Rationale Thesis, Neutral-Content Thesis, and the Neutral Description Thesis. These theses shall be considered seriatim.

2.3.3.7.1 ETHICAL POSITIVISM

It is not exactly clear whether Campbell's view is meant to provide an update on the possible lists of revisions adopted by legal positivists to meet the challenges posed by the moral dilemma or question on legal validity. But what is clear is that Campbell's attempt is a clear instance of one of positivism's normative claims. According to Campbell, "ethical positivism" is the view that determinations of law ought never to depend on moral considerations even though they in fact quite often do in the operation of modern legal systems.

In other words, Campbell's reasoning consists in the view that as a matter of sound political morality, the "identification and application of law ought to be kept as separate as possible from the moral judgments which go into the making of law."[220] If this is counted as a normative claim, there is every basis for asking why such a

separation is necessary. Could it be that moral considerations or judgments distort the true nature of law? Or could it be that it makes it impossible to ascertain the nature of law in modern societies?

The merit of Campbell's agenda is in the fact that it tallies with legal positivism's claim about the nature of law. But then, if we are to accept the claim, we must examine the basis of the claim. To do this, it is incumbent to state that what can actually project the truth of Campbell's claim is an empirical study of why moral judgments are found to be part of legal systems in modern societies or why it is that determinations of law have been found to endorse moral judgments. Again, one possible problem with Campbell's thesis is that it is not a practicable claim, though normative, since the assumption of the claim is not the way the world is. For example, in Shariah states, the routine of legal validity is often defined using religious and moral concepts. Again, the legal system in the United States, as officially recognised and encoded in the constitution, is inclusive of moral concepts. Constitutional provisions which serve as guides in the making of laws consist of moral concepts.

Besides, the pointlessness of the thesis is informed by the fact that it fails to address the reasons why moral judgments have been found to be included in the determinations of law. Last but not the least, Campbell's ethical positivism is an ideal which runs counter to a central presupposition of legal positivism, which is the attempt to provide the science of law. It is an ideal which is materially contingent. Even though Campbell's normative thesis concerns the actual practice of identifying and applying valid laws, i.e. the practice of making determinations of law, nevertheless, it posits and defends an ideal to which legal systems ought, morally, to aspire even though Campbell acknowledges that often they do not do so.

---

[220] Campbell, T. *The Legal Theory of Ethical Positivism*, Aldershot: Dartmouth Publishing Co. Ltd., 1996,

2.3.3.7.2 THE FALLIBILITY THESIS

The fallibility thesis was coined by Klaus Füßer not necessarily as a positivist's claim but as an expression of one of the possible, numerous normative claims about or of positivism. To properly place a thematic and jurisprudential focus on the fallibility thesis, Füßer contended that a further distinction must be made if we are to understand positivists' normative claims on the separability thesis and the reasons why some scholars have been so critical about positivists' insistence.

What then is the fallibility thesis? The fallibility thesis is the view that law does not necessarily have positive moral value. In obvious terms, the fallibility thesis is an interrogation of the nature of law, sifting and expressing what is essentially law-like and what is not. By inference, it posits the view that law and morality or moral considerations are at par. When the whole process of understanding of law is carried out, it is ascertainable that law does not in any way represent, project or depict, in any sense, moral values. Thus, according to the fallibility thesis, law stands separated from morality or in another sense, it is what it is by virtue of what it is in itself.

The fallibility thesis could then be interpreted as making either a conceptual or a descriptive claim.[221] As a conceptual claim, the fallibility thesis is an attempt to analyse the concept of law by recording, systematizing, and building models to help make sense of the conceptual commitments revealed in what we might call the legal data.[222]

Such conceptual claims create for our understanding of law the added quality of separating what is legal from what is not legal. In other words, it means that there

---

p. 3.
[221] Morauta, J. *op. cit.*, p. 114.
[222] Füßer, K. "Farewell to "Legal Positivism": The Separation Thesis Unravelling" in *Autonomy of Law*, The Autonomy of Law: Essays on Legal Positivism ed. Robert P. George (Oxford: Clarendon Press, 1996, p. 122.

is the realm of the moral and there is the separate realm of the legal. As a conceptual claim, the fallibility thesis is one of the several forms of the endorsement of the separation thesis, perhaps. The fallibility thesis in this sense is what Klaus Füßer calls an object-level claim about law. It is a claim about the existential status of law. In other words, it is a description of a state of affairs.

Object-level claims about law are claims about the existence of law and how the existential manifestation of law is. In other words, it is about what law is in its existential form. In a nutshell, this is a claim about law itself. It raises intelligent questions such as 'what are the data presented to us when we talk about the existence of law?' The contention of the fallibility thesis is thus the view that when the data of law, in its existential category, are listed, part of what is listed and is expected to be listed are non-moral factors and data. In other words, entailed in the fallibility thesis are contentions about the moral qualities of the law. From a careful reading, it follows that the fallibility thesis is corroborative or supportive of the separation thesis.

The extent of their truth, however, will be proved by the nature of their verification. For if it is true that law does not necessarily have a moral value, apart from being a conceptual claim about the veritable concepts by which we know the idea of law, it is an essentially empirical claim about what we know already, though collection of data on law or on the nature of law, can be said to be an on-going activity. And even as an empirical claim, it can be asserted without contradiction that this claim about the nature of law is not conclusive since further efforts can still be made to ascertain and establish the nature of law.

If applied to the separation thesis, the fallibility thesis amounts to an empirical thesis or claim about law itself and about the sources of law in general. Juxtaposing the separation thesis that there is no necessary connection between law and morality and the fallibility thesis that law does not necessarily have positive value generates a kind of ambiguity with regard to the verification of their truth. The ambiguity stems from the fact that if the fallibility thesis is on one hand conceptual and on the other hand empirical, then it follows that the ambiguity is sourced in the fact that the claim of fallibilism revolves around the use of words in more than one sense but which has been reduced to one essential meaning. The fallibility thesis therefore ignores the need for specificity in sustaining its argument.

Again, to make a claim such as the fallibility thesis is equally to ignore not just the demand for local situations but also the necessity of understanding local specificity in the understanding of the nature of law. It is logically conceivable that there exist specific regions or local situations which compel us to arrive at the view that law in its pristine form cannot be divorced, regardless of how negligible the point of intersection is, from its moral dimension. It is also reasonably imaginable that law is itself naturally clustered in a moral network. For a scholar like Lon Fuller, law cannot be understood in the way it is expressed in the fallibility thesis in as much as there is what he calls the internal and external morality of law.[223] If law is removed from the Austinian model, which many authors have, severally, in their own way acknowledged, then it is not the case that law can then be viewed as removable from an evaluative ecology.

The fallibility thesis tends to incorporate unwarrantedly a kind of essentialism in the conceptualization of law. For if it is true that in all societies, it cannot be said

that the fallibility thesis is true, as a matter of empirical truth, then what the fallibility thesis is endorsing is the view that law is the same everywhere. But this is clearly not the case. It may even be that such exceptions are such that prove the rule false, but the important thing is that empirically, law is not built on what is often said to be law alone.

As a normative account of law, the fallibility thesis is a perennial neglect of the significance of locally focused concerns of specific norm subjects in specific jurisdictions. What is more important in our estimation of the fallibility thesis is that it undermines, as unnecessary and redundant in the understanding of law, the evaluative moral instinct which attends to the making of law in a given society. An instinctual evaluative response resides in the heart of men in societal relationships with law both as a cultural and a social institution. Fuller's argument, the view that there is a view of man implicit in legal theory, if right and plausible, tends to corroborate this view. According to Fuller, "every departure from the principles of the law's inner morality is an affront to man's dignity as a responsible agent".[224]

2.3.3.7.3 THE NEUTRALITY THESIS

Klaus Füßer also suggested as an alternative to legal positivists' separation or separability thesis what he calls 'the neutrality thesis'. The neutrality thesis is endorsed as a veritable theory or thesis of positivism by some scholars.[225] The neutrality thesis is a meta-level claim and it is primarily directed at or raised as claims concerning theories about or of law. A meta-level claim, unlike object-level claim, is about evaluating the data of law. Perhaps, it is about what to do after the access to simple, ordinary data about law and its multifarious expression in the cultural, social

---

[223] See *The Morality of Law*, New Haven: Yale University Press, 1964.

and institutional life of each society. In other words, it is about the word 'law'. In a sense, we can assert that meta-level claims about theories of law or the word 'law' is a semantic claim or evaluative claim. What then is the neutrality thesis?

According to Klaus Füßer, the neutrality thesis is the claim that in defending our conceptual claims about law, which some describe as offering a theoretical definition of the word 'law', we ought to steer clear of moral factors. An obvious, recent example of the positivists' neutrality thesis was offered by James Morauta. Morauta defends a positivists' view of the neutrality thesis in the following terms: "the correct analysis-statement does not by itself entail any substantive claims about the moral values of law as such."[226]

According to Morauta, the neutrality thesis is different from the social thesis and value thesis for two reasons: one, endorsing the neutrality thesis seems to involve more than endorsing the social thesis; two; the neutrality thesis could be true, in the language of Morauta, even where the social thesis is false.[227] In the same vein, the neutrality thesis could be distinguished from the value thesis in the sense that, unlike the value thesis, the neutrality thesis is not a substantive claim about the moral value of law.[228]

In distinct terms, therefore, it can be stated that the neutrality thesis thus rejects philosophical moralizing in the presentation and conceptualization of law. Thus, each and every attempt to offer a jurisprudential account on the nature of law, particularly at the theoretical level, should not be mixed. In this regard, what is latent in the neutrality thesis is the view that law is essentially neutrally possible to be

---

[224] Fuller, ibid., p. 162.
[225] James Morauta, "Three Separation Theses" in *Law and Philosophy*, 23: 111-135, 2004.
[226] Ibid., p. 128.
[227] Ibid., p. 128.

known without considerations for moral ideas and values. This means that the description of law in moralistic terms is not necessarily in the nature of law, but an addition to it; morality is not part of law but an addendum. Thus, the neutrality thesis is bound to be at odds with many jurisprudential theories such as the natural law theory, and perhaps, the historical school of jurisprudence.

What may not be clear about the claims of the neutrality thesis is whether if law is truly part of the history, the culture, including the morals, and growth of a people's history, then to describe law in such terms will be to be engaged in a jurisprudential misnomer. This is because if the claims of the school of Romanticism are true, then we are bound to have problems with the claims of the neutrality thesis. The initial problems may start with the wonder whether any human institution can be rendered in truly neutral terms. Law is significantly tied to human lives as social and cultural institutions, and these are aspects of the life of people.

Sometimes, when the claims of the neutrality thesis are examined closely, it is contended that one fundamental problem of the thesis could be that in an attempt to offer a theory of law that is neutral, in moral terms, there is the very possibility of offering a theory of law that is self-stultifying in terms of objectives, goals and essence. In other words, it may be that some of the endearing dimensions of law may stand to be omitted.

In fact, it is equally true that engendering a neutrality thesis in jurisprudence may end up producing a theory of law that is completely artificial and stripped of its depth value. If any theory is successful in terms of the neutrality thesis, then it is not a misnomer to contend that such a theory is not only artificial but equally deliberate

[228] Ibid., p. 129.

and intentional. In that case, what may appear as the end product may not be original, since it must have been deliberately pruned. In the process, we are bound to have problems with understanding the end product or what is thereafter presented as a theory of law. A deliberate theory of law may be counter productive. As a matter of fact, a theory of law in line with the neutrality thesis may turn out to negate what was initially thought of a prospect for our theorization about law since nothing is deliberately done that is without a mindset.

But then, lest we be found to be unfairly critical of the neutrality thesis, it could happen that what the thesis is suggesting is a neither-here-nor-there theory that will not be intellectually offensive but one on or through which other propositions about law can be inferred. Statements of moral and/or prudential obligations may end up being inferred from such propositions but the initial premise should be such as to manifest only qualities that are strictly legal and none other. For the neutrality thesis, this kind of objective can be achieved in either of two ways or in both ways. Both ways can be regarded, according to Klaus Füßer, as the "Neutral-Rationale Thesis," and the "Neutral-Content Thesis."[229] In the first place, a neutral account of law can or ought to be offered where the determinations of law are stripped of any attachment, reference or considerations of morality. This is the neutral-rationale thesis. In the second place, the neutrality thesis advocates the view that we ought not to defend the choice of a concept of law, or a theory about our present conceptual commitments concerning the nature of law, on moral grounds.

If the central statement of the neutrality thesis in the two versions just stated is cited as a corroboration of the separation thesis, then it follows that either one of

[229] Füßer, K. "Farewell to "Legal Positivism": The Separation Thesis Unravelling", p. 34.

or both the neutrality and the separation theses are bound to run into problems. When Bentham was defending the need to keep morality and law separate, one of the grounds for advocating the thesis of separation consists in the reasoning that separation will help us to see the precise issues involved in laws that are clearly unjust and bad. To conflate them will obscure the facts that we ought to be aware of. For Bentham such a separation will help us to argue for, on moral terms, law reforms.

If this statement is true, then it is possible to say that, in the ultimate sense, the neutrality thesis is, in fact, antithetical to the separability thesis, going by the Benthamite version. The neutrality thesis is also not in line with Hart's defence of inclusive positivism, especially as contained in the postscript. As Hart reasoned in one of his defences of inclusive positivism,

> *What surely is most needed in order to make men clear sighted in confronting the official abuse of power, is that they should preserve the sense that the certification of something as legally valid is not conclusive of the question of obedience, and that, however great the aura of majesty or authority which the official system may have, its demands must in the end be submitted to a moral scrutiny*[230].

As a matter of fact, the neutrality thesis in its two-pronged version appears an impossible task to carry out in jurisprudential inquiries into the nature and substance of law. This is because it endorses as original and builds as a jurisprudential expectation an attitude that is completely at odds with human nature. It is part of human nature to demand for compelling moral or prudential reasons why an action should be embarked on or why an activity should be engaged in or disengaged from. To adopt or choose a conception of law according to which law and morality are, both conceptually and in practice, separated in the ways in which the neutrality thesis and exclusive positivism say they already are separated, is to run a system of law that will be counter productive to human progress and human development. In fact, neutrality

is an impossible attitude or frame of mind given the fact that human rationality is almost always defined in relation to the existence of choices and preferences, especially in relation to human needs and aspirations. Morality and moral values, apart from other values, have been of endless attraction in this panoramic expression of human aspirations and needs. It may be found that some positivists may reject some of the dimensions of the neutrality thesis either in its rationale perspective or content dimension.

In recent times, within positivists' circle and, in fact, among some scholars in a feeling of sympathy with positivists' jurisprudence, from the eye of the neutrality thesis, have argued that, while the neutrality rationale and content theses may appear unacceptable, it is possible to invent a normative account of the analysis of law which is at once evaluative apart from being descriptive but whose standard of evaluation is not moral in nature but in fact threatens the status and usefulness of morality. This is what is referred to as the Neutral-Description thesis.

The Neutral Description Thesis is the view that it is both possible, desirable, and philosophically enlightening to describe (and explain) a legal system as it is, without at the same time engaging in its moral evaluation. In Waluchow's estimation, positivists often defend further meta-level claims concerning the very possibility of describing versus evaluating legal systems, between what are sometimes called 'analytic' and 'normative' jurisprudence.[231]Hart has been found providing an excellent defence of the view that jurisprudential analysis consists of first describing a legal system and secondly, evaluating such after description.[232] The conviction of Hart is

[230] H.L.A. Hart, *The Concept of Law*. p.206
[231] Waluchow, W. "The Many Faces of Positivism" in *University of Toronto Law Journal*, XLVIII, No. 3, 1998, p. 8.
[232] See Hart, *The Concept of Law*, passim.

that in order to evaluate the law, one must first know what it is. In a somewhat radical sense, Neil MacCormick once characterised legal positivism as minimally "insisting on the genuine distinction between descriptions of a legal system as it is and normative evaluation of the law which is thus described.[233]

Dworkin has attempted a demonstration of the falsity of the neutral description thesis. According to Dworkin, legal theory is necessarily interpretive, and therefore pursued from the point of view of an internal participant who must necessarily attempt to place the object of study in its best moral light. Thus, Dworkin's fundamental claim is that the insider's perspective is the only coherent perspective from which legal theory can be done; and the insider's perspective is that of a participant in a particular legal system who offers an interpretive account of his own legal system. Thus, if accounts of a legal system are necessarily interpretive, then interpretations necessarily include both description and evaluation.

Among Dworkin's other principal assertions against positivism's endorsement of the Neutral Description Thesis is what he calls 'the default thesis'. For Dworkin, by endorsing the Neutral Description thesis, what positivism seems to be suggesting is the view that "propositions of law can only be determinatively true or false when they can be demonstrated as one or the other [via something like Hart's rule of recognition]. Positivism then claims that nothing that cannot be demonstrated to be true in some such 'positive' way ... can be true."[234]

If we understand Dworkin very well, two errors seem discernible in the positivists' default thesis. The first is that, in practical terms, not all legal systems exhibit the kind of rule of recognition that is celebrated in Hartian positive

[233] MacCormick, Neil *Legal Reasoning and Legal Theory*, (Oxford: Oxford University Press, 1978), 239-40.

jurisprudence. Greenawalt, for instance, has argued that there is no identifiable rule of recognition in the American legal system. The existence of valid laws in the United States is therefore not reducible to social facts. [235] This is the reason why Dahlman, for instance, suggested that the rule of recognition be taken to the slaughter slab.[236]

Two, it is relevantly true that the positivists' indeterminacy thesis, which Dworkin finds to be the rationale for the default thesis, is clearly mistaken since the indeterminacy of a thing does not deny it of existence. According to Dworkin, positivism confuses uncertainty with indeterminacy. From the fact that a proposition cannot be demonstrated, we cannot infer that its truth value is indeterminate; at best we can infer that it is uncertain. Thus positivism rests on a fundamental confusion.

2.3.3.8 REALIST POSITIVISM AND THE SEPARABILITY THESIS

One brand of legal positivism which deserves attention and whose philosophical input is of critical interests in understanding the relation between law and morality in jurisprudence is the school of realism. American Realism was a reaction against formalism that prevailed in the field of philosophy, economics and jurisprudence. Formalism consisted in an over-reliance on the role of logic, mathematics and *a* priori reasoning not based on actual study of the facts.[237] Hence, anti-formalist' critique of Bentham and Austin, in the area of jurisprudence, is understandable.

For instance, it could be argued that Bentham's recourse to the hedonistic calculus of pleasures and pains was borne out of *a priori* reasoning rather than a reliance on actual facts. In other words, the calculus was not empirical enough. It was built on abstract reasoning rather than on facts which could also help in solving the

---

[234] See Dworkin, R. "Indeterminacy and Law" in *Positivism Today*, (Aldershot: Dartmouth Publishing Co. Ltd., 1996, p. 1.
[235] Greenawalt, "The Rule of Recognition and the Constitution", 85 *Michigan Law Review* (1987), p. 621.
[236] Dahlman, C. "Adjudicative and Epistemic Recognition", *Analisi e diritto 2004*, a cura di P. Comanducci e R. Guastini, p. 232.
[237] Freeman, *Lloyd's Introduction to Jurisprudence*, London: Sweet and Maxwell, 1994, p.655

actual problems of life. Again, Austin's analytical jurisprudence also placed great emphasis on logical analysis, especially of concepts and use of terms, rather than the analysis of facts.

The anti-formalists were positivists and, essentially, pragmatists. They were positivists in as much as their doctrine entailed a consideration of true facts. However, more than this, they were pragmatists in as much as they thought that there was the need to enlarge knowledge empirically and to relate it to the solution of the practical problems of man in society. This trend of thought, pragmatism, was notably associated with scholars such as John Dewey and William James in philosophy and logic, Veblen in economics, Beard and Robinson in Historical studies and Justice Holmes in Jurisprudence.[238]

Championed by Mr Justice Holmes, the realist movement introduced into jurisprudence a different argument and analysis on the language of separation of law and morals. Essentially, the realist movement, being a revolt against formalism, contained a provocative and radical version of the separability thesis. The position of legal positivism that laws are social facts was adopted by American legal realism. Although the objectivity of laws as facts was essentially a shared view, positivism and realism differed on the source of those facts. While legal positivism located such social facts in the enabling acts of the sovereign, e.g. a monarch, realism placed a radical attention on the courts as the location of the social, factual nature of laws. The question of enquiring importance is why realism had to go in the direction of the law court, rather than the king's court? An answer to this question cannot be divorced from some salient aspect of American history.

The possibility open to us is that the most important empirical aspect of a legal system is in the actual workings and operations of the law court. When Bentham

contended that separation between law and morals was necessary in order to aid our understanding of the specific character of the authority of a legal order, the actions, workings and operations of the law court is one of the empirical means by which the legal character of a particular regime can be deciphered. In Nigeria, for example, the legal character of the Nigerian state can be relevantly understood in the actions of its judiciary. The Nigerian judiciary and its practices speak a lot about the nature of the regime. One of the indices of governmental perversion at the highest can be seen in the perversion of the due process of law and in the undermining of the principles of justice by the law courts. Therefore, at the centre stage of a legal system is what courts will do in actual fact.

Besides, it is rational to contend along with Holmes' that Austin's idea of sovereignty was not particularly suited to countries with a growing awareness towards a federal system of government where there is a constitutional distribution of powers. And in a federal system of government, with a constitutional distribution of powers, the need for constitutional interpretation is of tasking importance, a duty that is devolved on the law court. In sum, it is the relative and relevant empirical importance of the courts in the entire legal process and, perhaps, the entire political system that accounts for why realism went the way of the law court rather than the king's court.

Laws, therefore, are to be seen in essence as predictions of what judges will do in real situations or in actual fact. Hence, the empirical and pragmatic aspect of Holmes' jurisprudence consisted in his contention that the life of the law is in experience and not in logic,[239] and that law is the prediction of what the courts will do in actual fact.[240] Part of the empirical and pragmatic details about law as stressed by

[238] Freeman, *Lloyd's Introduction to Jurisprudence*, London: Sweet and Maxwell, 1994, p. 655
[239] Holmes, Jnr. *The Common Law*, 1881, p. 1.
[240] Holmes, O. W. (Jnr). "The Law as Predictions of What Courts will do" in *The Nature of Law*, M. P. Golding, New York: Random House Inc., 1966, p. 179.

Mr. Holmes included the view that law must be strictly distinguished from morals since the lawyer is not interested in telling his client what ought to be but what actually is.[241] For Legal (American) Realists, the significance of the prediction of what the law court will do, in actual fact, and nothing more pretentious, as a clue to understanding the nature of law can be demonstrated in the acts of 'the bad man,' hence 'the bad man' theory of law.

Significantly, therefore, 'the bad man' theory or notion of law, as peddled in Holmes' realism, is one of the ways by which the nature of law and the connection between law and morality has been severally understood, conceived and translated. In principal terms, the bad man conception of law is entailed in what jurists and legal scholars regard as the predictive theory of law. The predictive theory of law consists in the view that laws are what the courts declare it to be.

The idea of prediction in the understanding of law comes to the fore in the light of the scheming and thoughts of the bad man whose sole interest is in the possibility of escaping the hands of the law by envisaging and anticipating what the law courts are likely to say on the matter in question. For the bad man, whose desire is to escape the hands of the law, law is not what the books declare them to be but what is likely to be pronounced as having the effect of the law by the law court.

But then, the bad man notion of law as entailed in the predictive theory sheds further light on the relation between law and morality. The bad man theory of law is significantly tied to the predictive or prophetic theory of law. The predictive theory of law is popularly connected with the American Realist Movement. In actual fact, Justice Holmes Jnr. supplied the running thesis of both the bad man idea of law and the predictive theory of law. Some of the pressing questions that arise from the foregoing are as follows. What is the predictive theory of law? What is 'the bad man'

[241] Holmes, *Collected Legal Papers*, New York: 1920, p.179

theory of law? What is the intellectual foundation of the bad man idea of law? Of what significance is the bad man idea of law in our understanding of the relation between law and morality?

The predictive or prophetic conception or theory of law provided the intellectual foundation of the bad man theory. In turn, also, the intellectual foundation or stimulation of the predictive theory of law was provided by the general revolt against the natural law thesis. Invariably, therefore, the predictive theory of law was conceived against one of the famous thesis of the natural law tradition; that is, the intellectual advocacy for the inseparation of law and morality. Justice Holmes supplied the language of this rejection. According to Holmes, much theoretical twisting about the constituents of law among legal scholars has often tilted towards pointing to the reason and light provided by nature. For Holmes, this is an error. In his words,

> *What constitutes the law? You will find some text writers telling you that it is something different from what is decided by the courts of Massachusetts or England, that it is a system of reason, that it is a deduction from principles of ethics and admitted axioms or what not, which may or may not coincide with the decisions...*[242]

The starting point for the predictive theory of law is the legal realist conception of law. Holmes' realism consisted in the central and pivotal role of the courts in declaring the very language and force of the law. In a reflective and profound declaration, Holmes contended that "the prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law"[243]

In this instance, therefore, the law is entailed in the idea of prediction. Prediction, as an idea, holds the clue to the true understanding of law. This predictive or prophetic ferment in and about law stems from the mind and the reading of the bad

[242] O. W. Holmes, *Collected Papers*,1920, p. 172.
[243] Ibid., p. 173

man. The bad man has a prophetic or predictive outlook on the concept of law. In the words of Holmes, "if you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience.

According to Holmes, the bad man theory not only affords an independent and fruitful clue to understanding the nature of law, it also helps us in understanding the relation between law and morality. This, for Holmes, is very crucial. Reflecting on the significance of the bad man for legal theory, W. Twinning contended that "when Holmes advised his audience to adopt the standpoint of the Bad Man, he was not seriously urging them to use the Bad Man as an ethical model, rather, he was suggesting that they look at law from the perspective of a citizen who is concerned with predicting the consequences of his actions."[244] From this conception of law i.e. from the point of view of the bad man, Holmes draws the conclusion that the bad man experience compels us to arrive at the conclusion concerning the practical distinction between law and morality.

There are many points of intersection between law and morality. For Holmes, for instance, "the law is the witness and external deposit of our moral life."[245] In another light, Holmes also is of the view that law has had a lot to borrow from morals not only in terms of phraseology but in terms of its effect in making many of its citizens and adherents good citizens despite the cynicism of many.

However, the point of distinction between law and morality, for Holmes, can be seen in the attitude of the bad man towards the law and towards any system of morals. The bad man cares a lot about his actions in relation to law and, more

[244] See Twinning, "The Bad Man Revisited" in 58 *Cornell Law Review*,1973, 275, p. 282.

importantly, the pronouncement of the courts while at the same time cares less for the existence of ethical rules.[246] The attitude of the bad man both to the law and morality proves the fact, for Holmes, that law and morality are not necessarily connected. Apart from the many instances of interaction between law and morality, the sole point of distinction between law and morality, according to Holmes, consists in the view that even though law is limited by morality, the limit of the power of the law is practically and theoretically not coextensive with any systems of morals alone. In his words,

> *No doubt simple and extreme cases can be put of imaginable laws which the statute-making power would not dare to enact, even in the absence of written constitutional prohibitions, because the community would rise in rebellion and fight; and this gives some plausibility to the proposition that the law, if not part of morality, is limited by it. But this limit of power is not coextensive with any systems of morals. For the most part it falls far within the lines of any such system, and in some cases may extend beyond them, for reasons drawn from the habits of a particular people at a particular time.*[247]

Not much reflection is needed to see that, indeed, the bad man theory of law is a partially true model of law but also a very questionable one with regards to the separability thesis. But then the more important lessons are yet to be drawn. Attacks upon the bad man conception of law have been made for a variety of reasons, but the criticism on which we intend to concentrate is that which centres on its attempts to draw a separation between law and morality based on the experiences of the bad man. The general indictment against the bad man theory has been brought about by many writers, jurists as well as moral philosophers.

One standard criticism of the bad man in mainstream jurisprudence is the charge of circularity in the sense that concepts like courts, officials, and judges etc.

---

[245] Holmes, O. W. "Law as Predictions of what Courts will do" in *The Nature of Law*, M. P. Golding (ed.), New York: Random House, Inc., 1966, p. 177

[246] Holmes, O. W. "Law as Predictions of what Courts will do" in *The Nature of Law*, M. P. Golding (ed.), New York: Random House, Inc., 1966, p. 177.

[247] Holmes, O. W. "Law as Predictions of what Courts will do" in *The Nature of Law*, M. P. Golding (ed.), New York: Random House, Inc., 1966, pp. 178-179

presuppose the idea of a legal system. According to Twinning, defining law in terms of predictions of the bad man or of what the courts will do involves an element of circularity in as much as those concepts must themselves be defined in relation to law.[248] Furthermore, Rogat argues that the bad man conception of law bordering on prediction is not an adequate conception of law simply because it neglects other standpoints in the definition of law and in the description of the totality of the legal system and processes.[249]

The question of preliminary importance for the bad man theory is this: is the bad man experience the best example in understanding law? What if we go by the experiences of the good man? The good man has a lot of insights to share with the public on matters of law, if indeed law is the witness and external deposit of our moral life, rather than the insights of the bad man. The great lessons we can achieve for the understanding of the study of law consist not in making it blurred or bad still, judging from the experiences of the bad man, but in encouraging men and women to come to understand the law as the route to ensure the considered and careful protection of those principles that constitute the political inheritances of any nation, culture or community of men. A comprehensive jurisprudence cannot be arrived, at using only the experiences and predictions of the bad man, who, in any case, cannot be said to be truly representative of the population of his society.

But more importantly, the palpable success of the bad man's intrigues and thoughts against the law is a compelling factor in holding unto the view that there could be a kind of inseparable relation between law and morality or simply taken. It is not enough to separate law and morality with the argument that separation invents the basis for an independent critique of law via the instruments of morality. The bad

[248] See W. Twinning, "The Bad Man Revisited" in 58 *Cornell Law Review*,1973, 275
[249] See Rogat, "The Judge as Spectator" in 31 *University of Chicago Law Review*, 1964, 213.

man does not care about morality because of the intellectual advocates of the thesis of separation. The intrigues of the bad man cease to hold about law when he comes to realise the necessity of inseparation. As a matter of fact, the success of the bad man is informed by the success of the thesis of separation. However, the failure of the bad man stems from the success of inseparation. To hold in check the intrigues of the bad man, it is therefore of compelling interests to students of jurisprudence to see the utility in the argument for inseparation.

2.4. CONCLUSION

In his essay "Farewell to 'Legal Positivism': The Separation Thesis Unravelling", Klaus Füßer claims that the separability (separation) thesis is 'hopelessly ambiguous,' having the extra ordinary capacity of blurring our understanding of law both in conceptual and practical terms. This contention, argues Klaus Füßer, is not without its basis. According to Füßer, positivists' separation thesis 'has been vacillating between object-level contentions about moral qualities of the law, on the one hand, and the meta-level issue of whether basic juridical concepts should be explicated free of moral injections, on the other hand.'[250]

What is crippling about positivists' use and interpretation of the separability thesis, argues Keith Culver, is not just its ambiguity but in its use of the word necessity. In the words of Culver, "at the object level, talk of 'no necessary connection' between law and morality amounts to a significantly empirical thesis about actual sources of laws, while at the meta level, talk of 'no necessary connection' between law and morality is conceptual."[251]

---

[250] K. Füßer, 'Farewell to Legal Positivism' in R.P. George, ed., *The Autonomy of Law: Essays on Legal Positivism* (Oxford: Clarendon Press, 1996) 119 at 120.

[251] Culver, K. "Leaving The Hart-Dworkin Debate" University Of Toronto Law Journal - Volume Li, Number 4, Fall 2001, p. 10.

If the idea of necessity implies an empirical one, surely, nothing is pretentious in claiming that there is a kind of empirical necessity in the relationship between law and morality. However, if the necessity argument is meant to be conceptual, then convincing arguments should be provided to validate the claim. The display of such ambiguities often results in the logical problem of hedging. Culver's conclusion is that "there is no univocal sense of the kind of necessity in operation, and consequently the account of 'law' generated by this ambiguous talk of necessity is itself 'hopelessly ambiguous."[252]

There is therefore abundance of evidence to show that much of the thesis contended to be core issues in positivists' jurisprudence have all been points of disagreements, not just with its opponents but even among the adherents. The source of the lingering disagreements has been no other thing than the lingering ambiguity which entails the way in which popular and aggressive positivists have branded their conception of the separability thesis. It is a proposition too plain to be contested that what really unites the many adherents of the school of positivism is just the name but with serious contentious debates as to what the matters of that positivism is.

We are inclined to believe that what has projected the vehement popularity of positivism in contemporary discussions on the nature of law is the fact that many of the adherents and supporters have chosen to tread and traverse the path of law which appears to have no concrete exemplification in the world of experience or any legal system anywhere in the world.

Positivism and its emphasis on the separability thesis appear inundated by what is potently experiential in nature. The kind of disagreements which have been entertained amongst positivists appears rather monumental. That is why it is our

---

[252] Culver, K. "Leaving The Hart-Dworkin Debate" University Of Toronto Law Journal - Volume Li, Number

contention that what positivists and non-positivists seem to be disagreeing over may just be conceptual in the sense that both are using concepts to capture reality in very different terms. In jurisprudence, it appears that there are three different kinds of conceptual analysis or work, if Letsas' work is anything to go by. These are (1) explanation of the linguistic usage (2) analysis of the significance of a concept in our practices and intuitions (3) identification of the moral criteria that must be met before the label should be applied.[253]

As Bix has relevantly argued, legal theorists provide different kinds of conceptual analysis (along these three categories) and that each kind is different from and consistent with the others. Thus, when theorists employing different sorts of conceptual analysis disagree, actually they don't, they just talk past each other.[254] This is because much of what is debated seems to have outlived their usefulness in the world of experience. Even amongst positivists, there are strong indications that the disagreements tend to display more of a semantically related problem rather than policies or politics. As noted by Dahlman,

> *The terminological disagreement between inclusive and exclusive legal positivism concerns the term "application of law", and can likewise be described as a stipulative disagreement over a jurisprudential maxim about the relation between law and morality. It can be described as a dispute over the dictum 'qui ius dicit suo more tantum ius non dicit' (to apply the law according to morality is not to apply the law).*

But then, a round off is urgently needed. Our submission consists in the following. The separability thesis is stringed on the question whether law and morality are connected. We can then ask: Are law and morality necessarily connected? The answers we get will ultimately depend on what is meant, not just what is said or what is implicated. If by 'necessarily connected', what is meant is sameness of concepts,

---

4, Fall 2001, p. 10.

[253] Letsas, George "H. L. A. Hart's Conception of Law" in *UCL Jurisprudence Review 2000*, p. 188.

the answer should be a resounding no. In this sense, law and morality are not the same concepts. Both concepts have different meanings.

If by 'necessarily connected', what is meant is whether or not they have a sense of relation, of course, it should be admitted that both law and morality are related, if not in many points, but in some essential points in which they have been found to be influential in human societal organizations and conducts. The fact that they do not enjoy sameness of concepts does not deny the fact that they are related, not by recourse to logic but by an excellent capture of their role in human affairs. Very perceptive and illuminating is Holmes opinion that "the life of the law has not been logic, but experience."

Again, if what is meant by no 'necessary connection' is the contention that both concepts are separable, apart from the fact that this contention has been hotly debated in jurisprudence, this contention sounds controversial but then a solution lies, again, in what is meant. If no 'necessary connection' is meant to be the view that both law and morality are conceptually dissimilar, then not much is needed to affirm the truth. As hinted earlier, law and morality are conceptually dissimilar.

The controversial sense in which legal positivists posit the relation between law and morality is not just in conceptual dissimilarity but in conceptual separability. So, it follows that legal positivists not only assert a thesis of conceptual dissimilarity but also separation. But we are persuaded there is a difference between something being dissimilar or different and something being separated. In other words, the idea of dissimilarity is held to be the same as separation by the positivists.

And without given to any predilections, conceptual dissimilarity does not presuppose nor suggest conceptual separability. Legal positivists often confuse

---

[254] See Bix, B., Conceptual Questions and Jurisprudence, Legal Theory (1995), p. 465; also in Bix, B., Jurisprudence: Theory and Context (London: 1999), p. 9.

conceptual dissimilarity with conceptual separability. The bone of contention has always been for legal positivists to prove what is meant. Instances where positivists have been taken up on what is meant, especially when we view it in its contemporary light i.e. the debate between inclusive and exclusive positivism, has involved one way or the other elements of intellectual and ideological hedging. This poses a number of logical problems for legal positivism especially on the relation between law and morality or basically in the denial of a necessary connection between law and morality.

Thus far, if there is any meaning to what is at stake in the debate over the separability thesis, it is the view that separability means that law and morality are independent of each other. This is a highly contentious claim that is most likely not true. It is yet to be proved that law and morality are independent of each other. The extent of the debates and arguments against counter-arguments in jurisprudence is an indication of attempts to separate, by philosophical argumentation, what has not been part of empirical facts. Empirically, legal systems in the world have shown a balance of tendency on their part that law and morality are complementary normative institutions and categories in human society.

As a matter of fact, to be conceptually dissimilar, in our opinion does not suggest that both are separable. On a second thought, one could retort that similarity is not identity. Only identicals are inseparable because they are the same. Whatever is not identical is separable. Law and morality are not identical concepts. Therefore, they are separable. This line of reasoning only takes on just one sense of the meaning of separation/inseparation. George Letsas observation about the nature of concepts is very instructive, and it is our plea that it be quoted at length. According to Letsas,

> *There is no way one can find what is paradigmatic and what isn't, unless he looks into the reasons that determine the conditions of a concept's application. The use is relevant but only as the consequence of those reasons*

> *and not, like Hart thinks, as their constitutive source. The ordinary-language theorist can not remain descriptive in front of a sum of speech acts that looks like a lexicographical report. He has to be an 'unordinary' observer; he has to evaluate the data...*[255]

The impression we can get from this statement is not the view that concepts are empty of practical values nor that they are meaningful without recourse to their practical application. The concept of law is not meaningful without an understanding of the normative dimension it purports to have and projects. One of the reasons that determine the conditions for the concept of law and its application in human society is morality. Even at the conceptual level, law as a concept is not immune from critical evaluations talk less of its practical consequences. As Bix has argued, sometimes, concepts are drawn to capture and/or explain reality. Even though this is held with a sense of caution, it can be stated that from common sense and experience and the chequered history of ideas, it has not been proved, empirically, that both concepts are completely independent of each other. Both concepts often reinforce each other. Many times, the concept of law has been very useful in the clarification of moral concepts and vice versa. Often times, their independent status is not definable in terms of separation. This is because it is difficult identifying a legal system whose criteria of legal validity excludes, in totality, moral criteria.

If the opinion of Hart is accepted, that jurisprudential problems and debates stand to be resolved just in case we have a clue to the definition of law, then it behoves us to say that the contentions over the separability thesis, arising from what our definition of law is, can be described as nothing but a confusion or disagreements over the nature of the use of words, even though many ideological pretensions seems to underlie the use of the words in question. In a relevant passage, Christian Dahlman noted that the disagreements between naturalists' and positivists' are a disagreement

[255] Letsas, George "H. L. A. Hart's Conception of Law" in *UCL Jurisprudence Review 2000*, p. 194.

over the use of words. The nature of the disagreements, in this respect, according to Dahlman,

> *...resembles the disagreement between natural law theory and legal positivism over the legal status of morally repulsive norms, like the Nuremberg Laws of Nazi Germany. Natural law scholars refuse to speak of such norms as "law",*[256] *while legal positivists find it appropriate to speak of them as examples of "unjust law".*[257] *This disagreement is also a battle over words.*[258] *It is not a disagreement over social facts. Natural law scholars do not deny that courts sometimes practice norms of this kind. And it is not a moral disagreement either. Legal positivists do not contest the wickedness of these norms. It is just a disagreement over the stipulation of the term "law". The disagreement is commonly described as a dispute over the dictum lex iniusta non est lex (unjust law is not law).*[259]

It is an unmistakable fact that the history of legal philosophy is replete with fantastic instances of dissonance in the contemplation and study of the framework and structure of law. The unsettled nature of the meaning and nature of law among legal philosophers and scholars, according to Williams, is based on the reasoning that words have no single proper meaning.[260]

In the light of this, it is our intention to show that the lingering uncertainty with respect to the nature and definition of law in legal philosophy and its critical relevance in the understanding of jurisprudential problems such as the relation between law and morality as pictured and presented in this chapter, affords the African jurisprudence project one of the several opportunities for self-expression and self-affirmation.

Without any iota of doubt, any serious scholarship on the place of law in African realities must of necessity raise questions about prevailing concepts,

---

[256] See for example Lon Fuller *The Morality of Law*, New Haven (1969), p. 39 and John Finnis *Natural Law and Natural Rights*, Oxford (1980), p. 285.
[257] See for example Hart (note 3) p. 209-10.
[258] Cf. Deryck Beyleveld and Roger Brownsword "The Practical Difference between Natural-Law Theory and Legal Positivism", *Oxford Journal of Legal Studies*, Vol. 5 (1985), p. 17.
[259] Dahlman, C. "Adjudicative and Epistemic Recognition", *Analisi e diritto 2004*, a cura di P. Comanducci e R. Guastini, p. 237.

[260] Williams, "Language and the Law" in *Law Quarterly Review*, 61 (1945/6), 179.

theoretical approaches and jurisprudential problems. This is as a result of the fact the architecture and furnishings of jurisprudential and legal researches have been by and large distilled from European and American experiences. The question then is this: is there the possibility of a cultural jurisprudence through which existing problems in western jurisprudence or any other culture's jurisprudence can be examined?

If the nature of a cultural jurisprudence is significant, then in the light of the problem of the relation of law and morality, J. G. Riddall's observation becomes very crucial and important. According to Riddall, "so closely may law and morality be intertwined that in some societies the two may be regarded as not forming separate notions. In the societies of the western world, however, the two spheres have generally been seen, notwithstanding the numerous interrelationships, as concepts that are distinct."[261] What then is the relationship between law and morality in the light of African jurisprudence or an African jurisprudence? Is the separability thesis endorsed or not in African jurisprudence? What is African jurisprudence?

What we are set to do in the remaining chapters is to examine the nature of the relation between law and morality, putting the discussions in western jurisprudence in view, in the light of African jurisprudence. It is in this sense that one may state that one area of momentous importance in the rediscovery and explanation of African philosophy of society, and one that has often been neglected in philosophy, legal philosophy and African philosophy, is the African philosophy of law.

[261] Riddall, op. cit. p. 295.

CHAPTER THREE:
ON THE QUESTION OF THE NATURE OF AFRICAN JURISPRUDENCE

3.1 INTRODUCTION

The question of African jurisprudence is not one that can be glossed as if it is not controversial. The indication that is conspicuously thrown up in much current jurisprudential literature is a loud absence of African articulation on the subject matter of jurisprudence. This is perhaps, a fallout from the long tradition of denying the existence and possibility of African philosophy, or African philosophical traditions. Fortunately, that scepticism about African philosophy has been definitely transcended.

Although the general denial of African philosophy has died a natural death, the implicit denial of African jurisprudence seems to persist. For instance, the classical and contemporary texts appear to regiment this controversial denial. A study of such texts as Carl Friedrich's, ***The Philosophy of Law in Historical Perspective***,[1] William G. Paton's, ***Jurisprudence***,[2] Freeman's ***Lloyd's Introduction to Jurisprudence***,[3] Hart's ***Definition and Theory in Jurisprudence***,[4] MacCormick's ***Contemporary Legal Philosophy: The Rediscovery of Practical Reason***,[5] Kelly's ***A Short History of Western Legal Theory***,[6] and of course, Hall's integrative ***Foundations of Jurisprudence***[7] reveals an obvious and conspicuous lacuna and pertinent discovery that presents itself to us is the fact that conspicuously missing in these panoramic

---

[1] Friedrich, Carl *The Philosophy of Law in Historical Perspective*, Chicago: University of Chicago Press, 1963.
[2] W. G. Paton, *Jurisprudence*, Oxford: Clarendon Press, 1972.
[3] M. D. A. Freeman *Lloyd's Introduction to Jurisprudence*, Sixth Edition, London: Sweet and Maxwell, 1994.
[4] H. L. A. Hart, "Definition and Theory in Jurisprudence" (1954) 70, *Law Quarterly Review*, 37.
[5] MacCormick, N. "Contemporary Legal Philosophy: The Rediscovery of Practical Reason" (1983) 10 *Journal of Law and Society*, 1.
[6] Kelly, J. M. *A Short History of Western Legal Theory*, Oxford: Oxford University Press, 1992.
[7] Hall, J. *Foundations of Jurisprudence*, Oxford: Oxford University Press,1973

canonisation of jurisprudential works is the canonisation of African intellectual resonance and mental disquisition on the idea of law.

At the level of perception is the view that an average text in jurisprudence is abundantly littered with theories of positivism or better still, positive jurisprudence, naturalist jurisprudence, Marxist jurisprudence. More recently, there has been the addition of what is called postmodernist and feminist jurisprudence. A lucid and clear account of these legal theories and the ideological framework that they bear clearly reflects a tendency towards what can be conveniently tagged a Eurocentric historiography or canonisation in jurisprudence.

This historiography is neither pretentious nor parsimonious. It portends to describe and explain the lived-out experience of members of the human community in its own image. The concept of canonisation in jurisprudence is neither helpful in this matter. Canonisation in jurisprudence has been centred on the varying perceptions and evidences that pertain to the function, nature and purpose of law in human societies. As argued elsewhere, while it is true that, in jurisprudence, canon formation excludes certain texts or notions of law, especially those derived from the African reality, its normative basis for that exclusion stems from a logic that is curious to the philosophical temperament.[8] Both aspects - Eurocentric historiography and jurisprudential canonisation - have been instrumental in the shaping of the question on the nature of African jurisprudence. In other words, existing patterns of canonisation in jurisprudence, except for recent times, exhibit a tendency towards Eurocentric historiography.

This chapter is interested in a philosophical inquiry into the absence of African thoughts on the nature, functions, scope and limits of law in philosophical reflections

[8] Idowu, W. "African Jurisprudence and the Politics of Social History: An Inquiry into the Dilemma of Canonisation" in *Lesotho Law Journal*, Vol. 14, No. 1, 2001-2004, pp. 1-27, at p. 9-10.

on law in particular and jurisprudence in general. To this end, the chapter hopes to probe into two different but inseparable issues with respect to the African jurisprudence dilemma. In the first place, it seeks to investigate what the nature of African jurisprudence is. In the second place, the chapter also hopes to inquire into what accounts for the dilemma of the canonisation of African jurisprudence in mainstream jurisprudential literature.

The chapter, however, commences its investigation of the question and nature of African jurisprudence from the fact that without settling the problematic of relevance one may not be able to settle the problematic of substance. The basis for this view consists in the fact that if there are doubts over the existence or possibility of a thing, either of two ways becomes relevant in arguing for or showing its possibility, its truth or existence.

The first consists in showing or pointing out what is denied, with the expectation that this ostensive definition and demonstration of the issue in question puts an end to doubts concerning its existence. This may be referred to as the *ostensive* or *demonstrative arguments* or *method*. This argument assumes that what may be called African jurisprudence already exists and only needs to be shown or demonstrated. This demonstration, it is believed, possesses the capacity to pale into rhetorical insignificance whatever objections or doubts are raised over the subject matter.

The second way consists in clearing the air of doubts about the possibility and the actuality of that which is questioned. Once this mindset is cleared, there will be sufficient aura of trust in not only believing what is asserted but also in accepting the truth of what is claimed. This is what is referred to as the *clarification argument* or *method*. The clarification method or argument consists not only in challenging or

demystifying the normative frameworks often peddled in the projection of an activity or practice but also in pointing out the absurdity or falsehood inherent in such frameworks.

In discussing the question of the existence of African jurisprudence or as it exists at the level of specific cultural worldviews such as Yoruba jurisprudence, Igbo jurisprudence, Barotse jurisprudence, Akan jurisprudence, this chapter adopts the position that a progressive way towards demonstrating the substance of African jurisprudence consists first in demonstrating the falsehood inherent in the claim over the non-existence of African jurisprudence after which efforts will be made to show or work out the substance of what may be labelled 'African jurisprudence' or philosophy of law. In demonstrating the substance of what an African jurisprudence will look like, the present endeavour is animated by the nature of Yoruba jurisprudence. Thus, empirical philosophical attention shall be devoted to articulating the nature of Yoruba jurisprudence armed with the conviction that Yoruba jurisprudence is a specific, cultural instance of African jurisprudence. This clear demonstration of scope does not however deflect from the fact that similar jurisprudence with Yoruba jurisprudence may be consulted for the purpose of corroboration.

3.2 AFRICAN JURISPRUDENCE AS AFRICAN PHILOSOPHICAL INQUIRY

In the construction of the history of ideas in the African epistemological, metaphysical and cultural milieus, there is every possibility or inclination towards the view that African jurisprudence is a counterpart of the African philosophy project. While the force of the Universalist perspectives on the existence of philosophy, and in this case, African philosophy seems tied to the perennial problem associated with a philosophy that is largely unwritten, the African jurisprudence debate is not riddled with such arguments. As observed by Samuel Imbo, "much of contemporary writing on

African philosophy is a challenge to the bases and content of western scholarship... Indeed, the theme of whether philosophy can exist and thrive in the absence of written texts runs through many contemporary discussions in African philosophy."[9] In the same vein, Kwasi Wiredu exclaims that

> *The African philosopher writing today has no tradition of written philosophy in his continent to draw on. In this respect, his plight is very much unlike that of, say, the contemporary Indian philosopher. The latter can advert his mind to any insights that might be contained in a long-standing Indian heritage of written philosophical meditations; he has what he might legitimately call classical Indian philosophers to investigate and profit by."*[10]

But does this vitiate the philosophical import in such African tradition, even if oral? The opinion of Robert C. Solomon and Kathleen M. Higgins is very instructive. In their estimation,

> *...it is highly probable that much of Africa has been inhabited by tribes with complex and sophisticated ways of thinking about the world. Indeed, listening to human beings talk and speculate from one end of the earth to the other, in rural villages as well as urban cafes, it is hard to believe that any people did not or do not "do" philosophy, in some form or another. They wonder, what are the stars? Why do things happen? What is the significance of our life? Why do we die, and what happens to us when we do? What is really good, and what is evil? There is no reason to suppose that such questions and the thoughts that follow them were limited to those cultures that eventually employed written language and thus preserved texts for future generations to read and study.*[11]

The veracity of this assertion opens us to a world of limitless possibilities with respect to the philosophical nature of African thought in general. It also establishes the basis for characterising a system of thought as either philosophical or not. For instance, it ascribes a philosophical dimension to any thought system that is inquisitive in nature. The import is that philosophy essentially deals with the art of wondering. Wonder starts and lubricates the philosophical enterprise. Such inquisitive thought systems are demonstrated by the human mind engaging itself in the search for answers

---

[9] Imbo, S. O. *An Introduction to African Philosophy*, Lanham: Rowman and Littlefield Publishers, 1998, p. xi.

[10] African Philosophy, Internet Material, www.google.com.

to some fundamental questions and issues of life such as death, the good life, the meaning of life etc. In one word, what is of interests is that a system of philosophy does not lie in the mere fact that such system of thought was written down. It is our presumption that, according to Solomon and Kathreen, philosophy consists not only in its existence in written form but also in substance.

As much as this observation by Solomon and Kathreen appears instructive, it is dampened by the fact that it was more or less a speculative proposition or proposal. It only ascribes a possibility to the existence of African systems of thought that could be described as philosophical. In any case, the merit of the proposal consists in the fact that it explores as real what had hitherto been classified as a myth.

In the light of this, the merit or truth in Wiredu's analysis needs to be qualified. While the first half of his assertion and observation may be true even though it neither precludes the presence of a philosophical spirit nor a distinct history, the other half of his comment on Indian philosophy may not be entirely true. A proper qualifier is needed. According to Will Durant, the origin of Indian philosophy is veiled and every attempt to pass a conclusive statement is at best hypothetical. What is sure about the beginning of Indian philosophy, according to Will Durant, is the very thing Wiredu affirms of African philosophy: the absence of written texts.

Perhaps, we can add that only in the modern age is the attempt made to harness together into writing the substance of Indian philosophy. "It was the usual course for a philosophical teacher in India," writes Durant, "to speak rather than to write; instead of attacking his opponents through the safe medium of print, he was expected to meet them in living debate, and to visit other schools in order to submit

[11] Robert C. Solomon and Kathleen M. Higgins, *A Short History of Philosophy*, New York: Oxford University

himself to controversy and questioning."[12] To this end, "Indian thought was transmitted rather by oral tradition than by writing," and the substance of this tradition was contained in what is called "*sutras* - aphoristic "threads" which teacher or student jotted down, not as a means of explaining his thoughts to another but as an aid to his own memory."[13]

All philosophy in the world tends to be limited by this fact. We were not told that Thales wrote anything. All he postulated were penned down, perhaps, by a generation quite remote from his time. The perennial orthodoxy of oral tradition as the commencing point of the transmission of all philosophy is not peculiar to the African milieu. And just as the absence of written texts is crippling for African philosophy, it has been for other systems and this was not, however, enough to limit the philosophical substance in the transmitted thoughts. The philosophical beauty of their thoughts is still appreciated in modern times. In very captivating terms, Solomon and Kathreen Higgins noted that

> *Only our ignorance and prejudice prevent us from entertaining the possibility that rich schools of philosophy and sophisticated argumentations once flourished throughout the world. Many societies had intricate oral cultures which used more-intimate and often more-effective methods than writing to hand knowledge from one generation to another. Face-to-face storytelling is captivating and personal. Literacy was rare. The written word was hard to come by and "cool", distant, and impersonal by comparison. Elders in oral societies passed along their wisdom in poetry and song. When those cultures disappeared, however, their ideas - and whole civilizations, in effect - were lost to us.*[14]

And what is more, due to the absence of writing on their part, later generations of scholars who were able to gather the thoughts of the past generations by some means, did not really capture the substance of their thoughts, considering the

---

Press, 1996, p. 6.
[12] Durant, W. *Our Oriental Heritage*, New York: Simon and Schuster, 1954, p. 533.
[13] Durant, W. Durant, W. *Our Oriental Heritage*, New York: Simon and Schuster, 1954, p. 534.
[14] Robert C. Solomon and Kathleen M. Higgins, *A Short History of Philosophy*, New York: Oxford University Press, 1996, p. 6.

possibility of later impositions on what their philosophical interests were. Thus, the problem of written ness is a defect common to almost all philosophy whether in the west, or the Far East.[15] The debate over the primacy or the superiority of Occidentalism and Orientalism in the entire history of thought is a classical demonstration of the Eurocentric nature of social history in general and intellectual history in particular. This is captured in Durant's observation that:

> *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 untechnically, 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.*[16]

The fate that inundated the cream of Hindu philosophy after the Mohammedan and Christian invasions which drove the heart of Hindu philosophy into self-defence and a timid unity that made treason of all debate and stifled creative heresy in a stagnant uniformity of thought could have, probably, affected African thoughts in the face of the many harassment from the era of slavery, to colonialism and the invasion of Islam and Christian missionary efforts even though this is a cautious remark obviously in need of historical verification.

As a matter of fact, the philosophical priority of Africa is 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. The presence of this jurisprudence is a telling argument on the existence of philosophy in Africa. Inherent in every system of jurisprudence, at least,

---

[15] Durant claims that writing was not popular in Vedic India. Writing continued to play a very small part in Indian education. Since writing was less highly valued than in other civilizations, and oral instruction preserved and disseminated the nation's history and poetry, the habit of public recitation spread among the people the most precious portions of their cultural heritage. See pages 556-561.

[16] Durant, W. *op. cit.*, p. 193.

is a philosophy that underlies it. The articulation of such a jurisprudential outlook, no matter how rudimentary, presupposes the existence of a philosophical worldview.

This contention is in agreement with the observation of Will Durant that no society that exists and continues to survive till today could have done so without order and one form of regulation or the other. In his words, "since no society can exist without order, and no order without regulation, we may take it as a rule of history that the power of custom varies inversely as the multiplicities of laws, much as the power of instinct varies inversely as the multiplicities of thoughts."[17]

3.3 AFRICAN PHILOSOPHY AND THE FOUR TRENDS

Significantly interesting, therefore, is the debate on the nature and the existence of African philosophy. Much of contemporary African philosophy is said to consist of four major trends. These are ethno-philosophy, Philosophic Sagacity, Nationalist-ideological Philosophy and lastly, Professional Philosophy. Ethno-philosophy is a system of thoughts that deals with collective worldviews of diverse African peoples as a unified form of knowledge. It is based on the myths, folk-wisdom and the proverbs of the people.

The term "ethno-philosophy" refers to the works of those anthropologists, sociologists, ethnographers and philosophers who present collective philosophies of life of African peoples.[18] Ethno-philosophy is thus a specialized and wholly customs dictated philosophy that requires a communal consensus. It identifies with the totality of customs and common beliefs of a people. It is a folk philosophy. An ethno philosopher is committed to the task of describing a world outlook or thought system

[17] Durant, W. *Our Oriental Heritage*, New York: Simon and Schuster, 1954, p. 36.
[18] See Imbo, S. O. *An Introduction to African Philosophy*, Lanham: Rowman and Littlefield Publishers, 1998, p. 8.

of a particular African community or the whole of Africa. This trend in African philosophy is represented by authors such as Placid Temples, Leopold Sedar Senghor, John Mbiti and Kagame.[19]

The second current trend of philosophy in Africa today, is the Sage Philosophy. Philosophic Sagacity is a reflective system of thought based on the wisdom and the traditions of a people. Basically it is a reflection of a person who is acknowledged both as a sage and a thinker. As a sage, the person is well versed in the wisdoms of his/her people and the people of a particular society will quickly recognize that sages possess that wisdom. But that is not enough. For it is possible to be a sage and not a thinker. The acknowledged sage must also be a thinker who is rationally critical and is capable of conceiving excellent options and recommending ideas that offer alternatives to the commonly accepted opinions and practices.[20]

Sages therefore transcend the communal wisdom and remain the spokespersons of their culture. Sagacity philosophers are convinced that the study of African Philosophy does not consist in the study of general works but in identifying wise women and men in society whose repute is very high on the basis of their wisdom. By interviewing them, their recorded wisdom and that of the professional philosopher amount to true African thought. Their aim is to show that literacy is not a necessary condition for philosophical reflection and exposition and that in Africa, there are critical independent thinkers who guide their thought and judgments by the power of reason and inborn insight. This philosophical trend is a creation of Late Odera Oruka.[21]

---

[19] Imbo, S. Imbo, S. O. *An Introduction to African Philosophy*, Lanham: Rowman and Littlefield Publishers, 1998, p. 8.
[20] Odera Oruka, "Sagacity in African Philosophy" in *African Philosophy: The Essential Readings*, ed. Tsenay Serequeberhan, New York: Paragon House, 1991, p. 52.
[21] See Odera Oruka, "Sagacity in African Philosophy" in *African Philosophy: The Essential Readings*, ed. Tsenay Serequeberhan, New York: Paragon House, 1991.

This trend is adopted by many contemporary philosophers mostly in Eastern Africa and other parts of Africa.

The third current trend of Philosophy in Africa is the Nationalist-Ideological philosophy. It is a system of thought, based on traditional African socialism and family hood. It represented by the works of politicians and statesmen like Cheikh Anta Diop, Kwame Nkrumah, Julius Nyerere and Leopold Sedar Senghor.[22] Sometimes the status of these men in African life, history and thinking transcends that of just politicians to one of philosophers with a set of articulated ideologies designed to create a pedestal in which the African ego can be best represented not just in the comity of nations but equally in the annals of conscious and articulated history. This trend of philosophy aims at seeking a true and a meaningful freedom for African people that can be attained by mental liberation and a return to genuine traditional African humanism wherever it is possible. So it is basically a socio-political philosophy and an ideology of liberation for the African cast in every realm of human existence.

The final unit of philosophy in Africa today is the professional philosophy. In the African context, Professional philosophy consists in the analysis and interpretation of reality in general. This trend or unit of philosophy in Africa emphasises the view that criticism and argument are the essential characteristics and conditions for any form of knowledge to be judged as philosophy. Philosophy is thus a universal discipline that has the same meaning in all cultures in spite of the fact that a particular philosopher may be conditioned by cultural biases, method and the existential situation in his/her society.

[22] Henry Odera Oruka, "Four Trends in Current African Philosophy" paper presented at the William Amo Symposium in Accra, Ghana, July 24-29, 1978; See also Lansana Keita, "Contemporary African Philosophy: The Search for a Method" *Praxis International* 5, no. 2 July 1985: 145-161.

According to this school represented basically by African philosophers such as Kwasi Wiredu, Paulin Hountondji, Oruka Odera, Peter Bodunrin, and Moses Makinde, African philosophy is the philosophy done by African philosophers be it on the subject matter that is African or alien. To these philosophers, African philosophy today is predominantly a meta-philosophy dealing with the central theme of, "What is philosophy?" and the corollary, "What is African philosophy?" Viewed in this context, it has some limitations that have been, identified by Odera H. Oruka as lacking personal subject matter, a prolonged history of debates and literature to preserve and expand itself as well as a limited degree of self-criticism.

The debate on the existence of African philosophy can be declared a stale engagement since it is often claimed that doing African philosophy in actual terms is intellectually profiting than making attempts to prove it. But it can be added that: if a jurisprudential worldview can be argued to exist in Africa predating the arrival and presence of Europe, and if it is accepted that every jurisprudence has a philosophical worldview that underlies it, then it can be stated without contradiction that philosophy is a common enterprise in the African cast.

Given this perfunctory analysis of the nature of the debate on African philosophy, it can thus be asserted that African jurisprudence, as legal philosophy or philosophy of law is an integral part, a branch of African philosophy. As much as this is true, it is, however, worrisome that there is no sufficient evidence to show that African philosophers have been interested in the jurisprudential dimension of African philosophy. Even in classical works on the nature and substance of African philosophy found in the Diaspora and on the continent, much of what can be regarded as African philosophy of law or jurisprudence is conspicuously missing.

For instance, Chukwudi Eze's[23] anthology on African philosophy serves as one of the best collection of essays on the theme, substance and nature of African philosophy. The work consists of fifty-six chapters with none devoted to an analysis of the substance of African jurisprudence or philosophy of law. What approximates the jurisprudential flavour are some articles on social and political philosophy in Africa but which are far removed from the jurisprudential context.

In the same vein, Wiredu's[24] collection of essays on the attributes and substance of African philosophy is a classic but then, only Murungi's[25] article featured as a work on what the province of African jurisprudence is like. The work is more of an interrogation rather than a conceptual and critical analysis; a reflection on the question of existence rather than an articulation of the substantive thesis of the nature of African jurisprudence. At best, the work is a critique of separability or separation thesis of another kind: the separation of African jurisprudence from the rest of jurisprudence. In his words:

> *Each path of jurisprudence represents an attempt by human beings to tell a story about being human. Unless one discounts the humanity of others, one must admit that one has something in common with all other human beings...what African jurisprudence calls for is an ongoing dialogue among Africans on being human, a dialogue that of necessity leads to dialogue with other human beings. This dialogue is not an end in itself. It is a dialogue with an existential implication...*[26]

From Murungi's assertion above, certain gems of truth with respect to the nature of general jurisprudence and African jurisprudence can be deciphered. One clear understanding is that jurisprudence is basically a human-centred enterprise.

---

[23] Eze, Emmanuel Chukwudi, ed. *African Philosophy: An Anthology*, Cambridge, Massachusetts: Blackwell, 1997.
[24] Kwasi Wiredu, (Ed.) *A Companion to African Philosophy*, Malden Massachusetts: Blackwell Publishing Limited, 2004.
[25] 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.
[26] Ibid., p. 525.

Jurisprudence is about humans and thus, law is about humans. This assumption underlies the contribution of jurisprudence in all cultures. This is corroborated in the light of Chinese philosophy, for instance. According to the realism of *Hsun-tze*, a Chinese philosopher, the necessity of law was informed by the nature of man. For him,

> *the nature of man is evil; the good which it shows is factitious...the sage kings of antiquity, understanding that the nature of man was thus evil...set up the principles of righteousness and propriety, and framed laws and regulations to straighten and ornament the feelings of that nature and correct them,...so that they might all go forth in the way of moral government and in agreement with reason.*[27]

But then, to what extent is Murungi's statement true that each path of jurisprudence represents an attempt by human beings to tell a story about being human? What is meant by being human in relation to jurisprudence? Is law necessarily human in nature and origin? What about laws such as international laws purporting to be connected with countries and states in the international scene? Since they also have a jurisprudential element, can they be regarded as human-centred? Isn't there a problem with this conception of jurisprudence?

From a critical perspective, if we understand Murungi very well, one is bound to conclude that, in actual fact, jurisprudence is a human-centred discipline. Even in the area of international law, the law in question is applicable to states indeed but what it means is that it applies to states as constituted by human beings. Areas of law such as maritime law, law of the sea, law of the environment, animal rights law and such other abstractions in the conception of law are meant to apply to man in the actual sense. From this reading, even where we talk about natural law in terms of the law applicable to all aspects of the universe, it is still to be submitted that law has meaning only in recognition to man and his interaction and encounter with the universe.

[27] Quoted in Will Durant, *op. cit.*, p. 686-7.

Where it is the case that natural laws guide the whole of nature, it is to be expected that the basic reason is to regulate the actions of man in his endeavour to explore and interpret the whole of the universe and encounter himself. More importantly, however, if this is what is meant, we can deduce that Murungi's conception tends to be positivistic in nature. But, is this a correct perceptual reading and understanding of Murungi's position?

The extent of his positivism, however, is not that settled. As a matter of fact, Murungi's conception of jurisprudence is not in consonance with modern, contemporary positivism even though it is described as a science of law from a human-centred perspective. Austinian jurisprudence, an obsession with human laws, deflects from the assumption of Murungi that jurisprudence is a human centred discipline. Crucial though to both conceptions of jurisprudence is the conception of humanity at stake, but then it is no misnomer to contend that there are divergent opinions on this issue.

The nature of Murungi's positivism is complicated and blurred. One of the revered elements of Murungi's African jurisprudence consists in his emphasis on the sacredness of tradition and customs when juxtaposed with the nature of modern European law. While Austin relegated the juristic and jurisprudential significance of custom in his analysis of the nature of law, Murungi's adoration and celebration of customs as possessing one of the keys to a cerebral understanding of the substance of African law is worthy of intellectual attention. On this issue, Murungi's statement tends to draw a world of corroboration and strength from the observation of Will Durant on the veracity of customs. In his words,

> *Underneath all the phenomena of society is the great terra firma of custom, that bedrock of time-hallowed modes of thought and action which provides a society with some measure of steadiness and order through all absences, changes and interruptions of law...when to this natural basis of custom a supernatural sanction is added by religion, and the ways of one's ancestors are*

> *also the will of the gods, then custom becomes stronger than law, and subtracts substantially from primitive freedom. To violate law is to win the admiration of half the populace, who secretly envy anyone who can outwit this ancient enemy; to violate custom is to incur almost universal hostility. For custom rises out of the people, whereas law is forced upon them from above...*[28]

For Murungi, what complicates the encounter between European law and African law is the abstruse relegation of the normative understanding of what it means to be human in an African way and how crucial that denial is to ideological basis of European jurisprudence. For Murungi,

> *"what is elemental in every jurisprudence is the conception of being human that is presupposed. It is precisely for this reason that it is herein claimed that African jurisprudence is what is at stake in being human for Africans. If jurisprudence is to be understood as a science, it is to be understood, in its African context, as a science of being human as understood by Africans."*[29]

What is also conceivable in Murungi's conception of jurisprudence is the fact that what connects jurisprudence in all cultures is its connection to an understanding of the internal aspects of humanity. This implies that as a human-centred discipline, the common element that features in all jurisprudence is what those jurisprudences have to say about man. Thus, at one level it can be said that jurisprudence is a unified subject since man is man every where and in all cultures.

But then, at another level, jurisprudence, even though it shares a common nature in all cultures which is the nature of man, is still different in the sense that the conception of what it is to be human differs from one culture to another. For example, the debate over the nature of man in western culture is still a philosophical puzzle. The debate between the materialist monist and the dualist idealists is a perennial problem yet to be solved in western philosophy. Western metaphysical philosophy tends to be sympathetic to the theory of materialism.

---

[28] Durant, W. *op. cit.*, p. 26.
[29] Op. cit., p. 523.

Whereas in other cultures, especially in Oriental and African philosophy, debates about the nature of man in not as controversial as it obtains in Western philosophy and even where controversy abounds, it is very likely that the nature of such controversy is of a different nature from those that can be highlighted in Western culture. In Egyptian philosophy, for instance, the idea of resurrection, in relation to man and his inherent nature was commonplace. If the Nile, Osiris and all vegetation, might rise again, Egyptian philosophy is of the conclusion that man also might rise again. [30]

The implication is that man has an immortal aspect distinguishable from his mortality. The body, *ka* and soul could both escape mortality and if cleansed of sin could enjoy the privilege of living forever in the Happy Field of Food - the heavenly garden.[31] The truth of this philosophy is one thing, its implication for the kind of jurisprudence likely to hold sway in this kind of conception of man is another.

Again, Murungi's observation also shows that African jurisprudence is a reactive jurisprudence. As a reactive jurisprudence, it is a response to the story about how the African conception of man is being told. In another sense, it can also be decoded that the under representation of any kind of jurisprudence is not borne out of any absence of substance but results basically from a denial of the humanity of a group.

From all these, it behoves us to interrogate and ponder on the peculiar absence of the African jurisprudence project not just within mainstream jurisprudence but also in African philosophical debate. The questions then are why is Africa's complex historical and cultural experience not fully represented in the current corpus of canonical works? Why is there so little, if any, respect for and, as a consequence, interest in African phenomena and their philosophical resonance? Why is it that there

[30] See Will Durant, *op. cit.*, p. 202.
[31] See Will Durant, *op. cit.*, p. 202.

is an intellectual numbness and muteness about all that is African? In what ways is the historical and cultural heritage of Africa reproduced, projected and represented in contemporary philosophical disquisition?

In mainstream debate on the existence of African philosophy, one crucial point of evidential importance in this whole representation and projection of the African historical and cultural heritage is the fact that what constitutes the definition of philosophy, the philosophy of society and its subject matter altogether has been, for some centuries, defined exclusively by the West. According to Olufemi Taiwo, "It is only insofar as Western Philosophy has passed itself off as Universal Philosophy that we may talk of the peculiar absence."[32] The catalogues of distasteful perceptions about Africa are not limited to the sphere of philosophy alone. It reflects entirely in the sphere of the production of knowledge - philosophy, science, technology, jurisprudence, morals etc.

3.4 AFRICAN JURISPRUDENCE AND THE FOUR PERSISTENT QUESTIONS

There are three persistent questions in the quest for the nature and substance of African Jurisprudence. These questions form the core of the quest for relevance of African jurisprudence in the idea of canonical formation, works and continuing innovations. However, in line with the tenor of thoughts adopted in this work, there is the addition of a fourth question. To this end, the structure of this chapter shall take upon a thorough discussion of each of these questions that form the core of the historical and canonical quest for the nature of African jurisprudence. The four questions are:

[32] Olufemi Taiwo, "Exorcising Hegel's Ghost: Africa's Challenge to Philosophy" (*African Studies Quarterly* 1.4, 1998, http://www.clas.ufl.edu/africa/asq/legal.htm)

1. Is there an African Jurisprudence?

2. What does it look like?

3. Why is African jurisprudence not represented in the body of canons in jurisprudential thoughts and reflections?

4. What is the significance or contribution of African Jurisprudence to selected debates and problems e.g. relation between law and morality, in mainstream jurisprudence or legal philosophy?

The question whether there exists an African jurisprudence is not new. What is new however is the contemporary freshness which the debate on African philosophy tends to have added. In addition, what is equally new is the interrogation of the essence and role of the African jurisprudence project in understanding some of the aching realities in mainstream jurisprudence or legal philosophy. In our view, (without reference to neat classifications in existing literatures since there are no such classifications), four glaring positions are discernible in the responses to the nature of African jurisprudence. These varying positions have their corresponding justifications.

In the first place, there are those who claim that there is nothing like African jurisprudence. The second position states that there may be but no one is sure what it consists of. The choice of the word 'may' is significant. The third position states that African jurisprudence is not too different from mainstream jurisprudence while the fourth response posits that there is an African jurisprudence with its distinctive attributes and substance.

In the first place, there are proponents of the view that African jurisprudence does not exist. It was J. F. Holleman who wrote in a very provocative work that there is nothing like an African Jurisprudence.[33] The great denial in Holleman's work is the view that Africans lack a conceptual and vividly correct analysis of the concept of law. Significantly, the import of this argument has been pushed further in the view that

[33] J. F. Holleman, *Issues in African Law*, The Hague: Mouton and Co., 1974, p. 13

even if Africans had indigenous systems of social control, it lacked substantially, any trace of legality, legal concepts and legal elements. This is also pertinently reflected in the view of J. G. Driberg that "generally speaking, symbols of legal authority [i.e. police and prisons ...are completely absent, and in the circumstances would be otiose."[34]

The attack on the idea of African jurisprudence has been reduced to the idea that African rules of societal control and norms could not be distinguished from rules of polite behaviour. The basis for this assertion and the denial of African jurisprudence, perceptively, can be explained in the light of three reasons: one, the absence of a legislative system, with the existence of a formal courts system and legal officials; two, due to the absence of a recognised system of sanctions; and thirdly, the presence on a large scale of authoritarianism which is not subjected to and controlled by law. Interestingly, the import of these attacks consists in the view that African jurisprudence is at best queasy.

Holleman's assertion concerning the possibility of the existence of African jurisprudence is not true to the facts. Even if it is true that present configurations of legal systems owed their influence to the presence of colonialism in Africa, it is not true, however, that Africans lacked jurisprudential system before the arrivals of Europeans. As observed by Kristin Mann and Richard Roberts, Africans had their own systems of laws before the conquest of Europe. In their words,

> *When Europeans conquered Africa they encountered populations with well established indigenous and Islamic systems of law. Conquest did not destroy these systems, although it often subordinated them to metropolitan legal traditions and changed their relationship to political authority and productive relations. Indigenous law and Shari' a law persisted alongside European civil, criminal, military, and administrative law.*[35]

---

[34] Driberg, J. G. "The African Conception of Law" in *Journal of Comparative Legislation and International Law*, 230, 1934, pp. 237-238.

[35] Kristin Mann and Richard Roberts (ed.) *Law In Colonial Africa*, Portsmouth, NH: Heinemann Educational Books, Inc., 1991, p. 8

Many aspects of Mann and Roberts's observation about African systems of thought in general and jurisprudence in particular appear illuminating. In the first sense, the denial of African jurisprudence or system of law is a historical denial undertaking in the light of a peculiar historiography. Ands what is more, African jurisprudence can be considered to be as old as other forms of jurisprudence or at best, as old as societies that produced them. Thus, the term 'indigenous systems of law' is indicative and instrumental. It is indicative of a sphere and a system that is not a mixture. The term is also historically significant since it demarcates the European from the African mind.

In another light, it can be said that African jurisprudence stands in a kind of power relationship with European jurisprudence. The relationship is thus one of domination and dominated. The difference, tactically and technically speaking, is that one had military power of conquest while the other was subordinated. More importantly is the fact that, if Mann and Roberts' observation is anything to go by, then it follows that there is an irreplaceable, irresistible, indestructible and never-die dimension of what African idea of law is. The conquest of European jurisprudence over indigenous African jurisprudence is not borne out of the poverty of its substance or intellectual contents but in the light of some military adventurism or supremacy which appears to back up the former. This last point is of crucial interests in the understanding of the jurisprudence of most African countries even in contemporary times. As emphasised by Murungi,

> *Colonial jurisprudence in Africa...was largely the jurisprudence of subjugation. Violence was an essential feature of this jurisprudence. In the eyes of Africans, colonial law was a concrete manifestation of this violence. It was a coercive power in its raw sense. Jurisprudence was the justification or validation of this violence. It was the gunman situation writ large...*[1]

In a significant sense, therefore, it is argued that the attempts to down play the reality of African systems in general and African Jurisprudence in particular has a

peculiar history. This history, according to our reasoning, is enmeshed in the projection of Eurocentric superiority. One of the historical interludes designed to achieve the task was colonialism. Mann and Roberts equally observed that colonialism changed African law in terms of rules, institutions, procedures, and meanings. In their words, "any understanding of the role of law in contemporary Africa must rest on an appreciation of the legal rules and institutions, processes and meanings created under colonialism. The history of law in colonial Africa forms an important chapter in the story of the expansion of western law overseas."[36]

But then it is sufficient to state, as a conceptual and intellectual response, that regardless of how primitive a society may be seen to be, it is human and logical to expect that the survival of this kind of society is an ample pointer to the existence of some form of enlightened thinking on the part of its members. According to Bewaji,

> *When we make a critical examination of the diversity of human beliefs in various parts of the world, it seems clear that even the simplest-looking belief system must be acknowledged to have developed from some form of critical examination of events, things, beliefs, etc. Without such philosophical presuppositions and, indeed, expostulations, on the part of members of these societies, it is difficult to see how such cultures and societies could have survived.*[37]

Again, in a more philosophical approach, Elias debunked the view denying the existence of African Jurisprudence. Connoting abstract linguistic correspondence, Elias retorted that "it would be difficult for Africans to have continued to enjoy the progress they have even in the face of civilisation if they could not think and feel about the interests which actuate them, the institutions by means of which they organise collective action, and structure of the group into which they re organised."[38]

---

[36] Ibid., p. 5.
[37] Bewaji, J. A. I. "Language, Culture, Science, Technology And Philosophy", *Journal On African Philosophy*: 2002, 1, 1.
[38] Elias, T. O. *Government and Politics in Africa*, Manchester: Manchester University Press, 1963, p. 12.

Secondly, there are those who contend that there is something reminiscent of law that can be labelled African Jurisprudence but the problem is that one cannot be sure of what the substance is or what it consists of. In this tradition, the view is held strongly that at best what Africans refer to as their jurisprudence or legal concepts are ingrained in customs, very crude and starkly naked in terms of reflective importance. For example, M'Baye constate that "the rules governing social behaviour in traditional African societies are the very negation of law."[39] In the same vein, M. G. Smith postulated that "African peoples only know of customs instead of law."[40]

In fact, Hartland rendered this point in ethnocentrically unmistakable terms when he opined that "primitive laws are in truth the totality of the customs of the tribe. Scarcely anything eludes its grasp. The savage lives more in public than we do; any deviation from the ordinary mode of conduct is noted, and is visited with the reprobation of one's fellows."[41] However, our argument consists in the view that to be ignorant of a fact or an entity does not deny that fact or entity from its actual existence. Anchoring one's argument on this kind of reasoning will be to be guilty of one of the instances of the *ignorantiam fallacy*.

The third position on the nature of African Jurisprudence consists of scholars who are of the view that African Jurisprudence is not too different from mainstream Western Jurisprudence. Hence, the question on whether there exists a separate sphere of legal thinking called 'African Jurisprudence' appears unnecessary and a mere superfluity of naughtiness and nothingness. The grand objective of this third position has always been to interpret and apply the nuances of schools of thought in mainstream jurisprudence such as positivism, naturalism, postmodernism, realism etc

[39] M'Baye K. "The African Conception of Law" in *The Legal Systems of the World and their Common Comparison and Unification*, International Association of Legal Science Vol. II, 1975, p. 40.
[40] M. G. Smith, *The Sociological Framework of Law*, Chapter 2, Kuper and Kuper, 1965, p. 30.
[41] Hartland, E. S. *Primitive Law*, London: Methuen, 1924, p. 5-6

as not only reflective of Anglo-Saxon jurisprudence but also reflective of African philosophy of society and the African legal tradition.

It is in this sense that one can suggest that the debate in the mid eighties between Okafor,[42] Taiwo,[43] and Nwakeze,[44] over which of the theories in mainstream jurisprudence best apply to the African legal tradition can be readily situated. Okafor, for instance, constate that

> *The legal systems and institutions we inherited from our colonial masters are not altogether alien to the African legal tradition. But some of the principles and concepts on which some specific legal practices are based are entirely alien to the traditional African legal experience. One such principle or concept which is widely held in Anglo-Saxon jurisprudence is legal positivism."*[45]

Nevertheless, Okafor ended up with the conclusion that the African legal tradition is more at home with legal naturalism than with legal positivism. The justification for this consists in the fact that legal naturalism is "in accord with the traditional African legal phenomena"[46] or what one might describe as a shared sense of sympathy and sameness with some of the ideals characteristic of African legal ideas. In Okafor's words, "the African legal experience...is largely in conformity with that favoured by the natural law school..."[47]

The core of Okafor's analysis consist in the fact that it is an apt representation of African ontological experience and worldview and how that ontology translates in very lively and telling terms to every area of the African life, including the legal. Apart from this, Okafor's submission is of compelling importance in painting what Africans think on the relation between normative categories and institutions existing within

---

[42] F. U. Okafor, "Legal Positivism and the African Legal Tradition" in *International Philosophical Quarterly*, Vol. xxiv, No. 2, Issue No 94, June 1984.
[43] Olufemi Taiwo, "Legal Positivism and the African Legal Tradition: A Reply" in *International Philosophical Quarterly*, Vol. xxv, No. 2, Issue No 98, June 1985
[44] Nwakeze, P. C. "A Critique of Olufemi Taiwo's Criticism of Legal Positivism and African Legal Tradition" *International Philosophical Quarterly*, Vol. Xxvii, No. 1, Issue 105, (March 1987)
[45] F. U. Okafor, "Legal Positivism and the African Legal Tradition" in *International Philosophical Quarterly*, Vol. xxiv, No. 2, Issue No 94, June 1984, p. 157.
[46] Ibid., p. 164

given cultures. But then, apart from interpreting African jurisprudence in the light of the ideals of the naturalist conception of law, Okafor's submission on the kind of relations Africans hold on the connection between law and morality does not derive its meaning from a conceptual rendition and understanding of what Africans hold as their legal theory. In unmistakable terms, Okafor only arrived at the conclusion that Africans see a connection between law and morality on the basis of the kind of ontology that are found existent within their culture.

On our part, we argue that assuming that Africans hold on to the fact that law and morality are connected, it is more convincing to derive such connection only on the basis of their conception or definition of law, and how morality can be seen to enter into that kind of jurisprudence. Even though Okafor enumerated quite appreciably what Africans understand law to be, he, however, dwelt much on the sources rather than a consideration of what Africans holds law to be in its conceptual form. It is believed that only such kind of conceptual detail can provide the basis for assessing what African jurisprudence and its momentous contribution to jurisprudence at large can be. But then, analysis must go beyond this.

Olufemi Taiwo's query of Okafor's paper and conclusion is not centred on the fact that Okafor interpreted African legal tradition in legal naturalist terms nor that the African legal experience is antithetical to the principles of law as expressed in legal positivism. Precisely, for Taiwo, the flaw of legal positivism consist not in its unAfricanness, but that even if it is African, it is still a bad legal theory which must be rejected in as much as it provides a very easy way out for unimaginative, squirming judges who wish to dodge responsibility for their interpretations of the law.[48] But Taiwo's disenchantment with Okafor's paper consists in the fact that it elicits some of

[47] Ibid., p. 163
[48] Ibid., p. 199.

the troublesome aspects of African philosophy today which is that of reducing the African experience in ethics and particularly law to one single legal tradition. This reduction, for Taiwo, is a myth. In his words,

> *...The "African legal tradition," the "African," etc., are all myths invented by their purveyors to camouflage the fact that they are shaping diverse African practices to fit their theories. On another level, these myths offer somewhat effective stratagems to evade taking responsibility for the often philosophically unsound melange their authors serve up as "African philosophy."*[49]

Even though we are not unconscious of the appeal of Taiwo's analysis in pointing out the fact that Africa may not have a single tradition or dominant tradition that can be peculiarly branded as African philosophy or African ethics, or that we should not mistake the common occupation of a geographical continuum for social consensus,[50] but then it is possible that Taiwo's dilemma on the denial of what may be labelled African legal philosophy, ethics or religion may bother on mere assumption rather than facts.

In actual fact, emerging facts borne out of anthropological researches and studies tend to contradict Taiwo's assumption. If we understand Taiwo's claim very carefully, we should have to come to the understanding that, according to Taiwo, there is no difference between African jurisprudence and Western jurisprudence, for instance, or Chinese jurisprudence. If this is Taiwo's reasoning, it is our view that such a claim may not be entirely true. What then would Taiwo mean by African philosophy, if talk of African legal tradition, African culture, African identity or African traditional values is self-defeating?

[49] Olufemi Taiwo, "Legal Positivism and the African Legal Tradition: A Reply" in *International Philosophical Quarterly*, Vol. xxv, No. 2, Issue No 98, June 1985, p. 198
[50] Ibid., p. 198.

Even if African philosophy, religion or ethics can best be done by concentration on specific cultures on the African continent, it still follows that what can be described as Yoruba philosophy, or Igbo philosophy or any other cultural philosophical studies will reflect some modicum of social and cultural differences when compared to Western social and cultural life. Is our muted objection to the existence of African culture or what have you not given sociological and anthropological significance when the West solely describes the history of philosophy as uniquely that of Western philosophy and nothing else?

These and some other issues are the central concerns of P. C. Nwakeze's rejoinder to Taiwo. According to Nwakeze, the problem of Taiwo in understanding Okafor's paper is the failure to admit or understand the idea of conceptual dualism with respect to Okafor's use of the word African culture, values etc. In his words,

> *A critical appraisal of Taiwo shows that he labours under two major problems, among others: one is conceptual/methodological; the other is substantive. The conceptual problem stems from his failure to distinguish between the use of "African Culture" in the generalised context and "African Cultures" in the specific sense. It is possible, and quite correct too, to talk of African culture, African legal tradition, African personality, African socialisation, norms and values, etc. so long as what is significantly common and fundamental to the cultures being examined is abstracted and emphasised*[51]

If we examine Nwakeze's point critically and carefully, we are bound to agree with him at least to a reasonable point. In very useful sense, we can point to the existence of philosophy in other cultures in corroboration of our observation. For example, in the area of epistemology and particularly the history of Western philosophy, there is a common talk about British Empiricism. What is asserted in this area of thought, presumably, is the abstraction of the fundamental commonalities and similarities which the authors that belong to the school in question all share and profess. Yet in very striking respect, each of the authors that represent the school of

empiricism are from different cultures within the British empire; yet, we still refer to them as British empiricists.

The same can be said of 19th Century European continental philosophy attracting a diverse kind of philosophical heritage such as German idealism, existentialism, phenomenology, hermeneutics, critical theory of the Frankfurt School, Deconstructionism and the popular Marxist movement, scattered all over Europe at that time. In classifying this kind of philosophical work, and tagging it European philosophy, it is believed that what gives these movements their uniqueness is the emphasis and the abstraction of what is fundamentally common and similar to each of these movements within Europe at that time. For example, existentialism is one of the prominent schools of the period in question in Europe. But then, it will be widely agreed that, apart from the fact that all existentialists do not share the same cultural background even in Europe at that time, and considering the fact that not all existentialists subscribe to the same views on existentialism, they are still referred to as existentialists in the sense that emphasised and abstracted for philosophical noting is what is common to all existentialists which is has to do with the nature of existence. It does not however preclude the fact that these scholars are all called existentialists.

The same argument is what is brought to play when, in a significant sense, African philosophy, African jurisprudence, African religion or ethics are discussed for the purpose of research and study. In most cases, what is meant is not the underestimation of what is different between these cultures but an excellent weaving of ideas together on what is perceived to be shared by cultures within a vast continent. Of course, this line of reasoning does not in any way suggest that there are no fundamental historical, political and social dissimilarities between one end of

[51] Nwakeze, P. C. "A Critique of Olufemi Taiwo's Criticism of Legal Positivism and African Legal Tradition" *International Philosophical Quarterly*, Vol. Xxvii, No. 1, Issue 105, (March 1987), p. 101.

Africa to another. To assert that will be to be involved in a kind of preposterous epistemological contention or assertion.

A recent dimension to the Okafor, Taiwo and Nwakeze debate is clearly portrayed in the thought-provoking article by Jare Oladosu.[52] The aim of Oladosu's project is an attempt to make an African case for legal positivism. Essentially, therefore, Oladosu's work is a critique of the conclusions of Okafor and Taiwo on the undesirability of legal positivism as a legal charter and agenda for African legal systems. The basic point of Oladosu's paper is the view that whereas Okafor and Taiwo have branded legal positivism as dangerous, evil and completely alien to the African heritage, legal positivism represents one of the best blueprints for legal advancement in Africa. This is premised on what Oladosu classified as the "the merit of legal positivism in the face of cultural diversities, ethno-national differences and religious heterogeneity" of each of the countries on the African continent.

In very trenchant terms, Oladosu's arguments incorporate what he calls "compelling pragmatic reasons for the legal systems of modern African states to choose the positivist theory of law, in preference to the natural law theory." In his words,

> *My case for the adoption of legal positivism by modern African states tracks on these facts of cultural diversity in traditional (or pre-colonial) Africa, conjoined with the unique colonial experiences, and the resultant post-independence ethnic and ethical composition of many African nation states at present*[53].

But then the critical question is how do these facts of cultural diversities, ethno-national differences and religious heterogeneity make legal positivism compatible with and suitable for African legal systems? The answer, for Oladosu, lies

[52] Oladosu, A. O. "Choosing a Legal Theory on Moral Grounds: An African Case for Legal Positivism," *West Africa Review*, Vol. 2, No. 2 (2001) [http://westafricareview.com]
[53] Oladosu, A. O. "Choosing a Legal Theory on Moral Grounds: An African Case for Legal Positivism," *West Africa Review*, Vol. 2, No. 2 (2001) [http://westafricareview.com]

in the fact that only legal positivism and its separability thesis i.e. separation of law and morality can accommodate these diversities. The Natural law advocacy of the inseparability thesis i.e. inseparation of law and morality cannot handle the problem of diversities. It is likely to fall as a theory. Why? For Oladosu, the answer lies in the fact that there will be many ethical and moral standards to choose from which is bound to create further difficulties and problems. The best option, according to the author, is the adoption of a legal idea or doctrine that emphasises separation and thus a single model for all.

Admittedly, there is a line of obvious similarity between Oladosu's argument for the desirability of legal positivism for African legal systems and Taiwo's rejoinder to and rejection of Okafor's "Legal positivism and the African legal tradition." However, there is a bit of divergence and one only needs to be perceptive enough to understand the tenor of arguments and conclusions well-developed in both papers.

The heart of Taiwo's argument against Okafor's conclusion on legal positivism and the African legal charter is that Africa cannot and should not be said to present or possess one distinct and almost universal cultural tradition, values or what have you. There are differing cultural traits that are not to be jettisoned but which are of both intellectual and philosophical significance. In very relevant and coincidental terms, Oladosu concurs with this assertion as possessing significant worth in a penetrating understanding of the African milieu. This is, as far as we believe, where they both agree.

But then, whereas these premises and arguments led Taiwo to some conclusions, one of which consists in the view that legal positivism is a bad legal creed not only because of its un-Africaness, but because of its implied consequences for any legal system for that matter, Oladosu's conclusion is to the end that those

dissimilarities are the very wheels on which legal positivism is pragmatically the best for Africa.

On our part, we tend to believe that there is something equally missing in the argument for the adoptability and adaptability of legal positivism based on its separability thesis. In actual fact, there is no one conversant with the multifarious problems that Africa is beleaguered with that will not sympathise with her. It is with the heart of sympathy for her deleterious conditions that many therapies have continued to be suggested to aid her quick recovery. But then, the therapy must consist in what she can bear with in the light of the prevailing facts concerning her condition.

Conceptually, it is mistaken to admit that what African legal systems need is a legal positivist creed which only allows for one legal position in the face of disparities in ethno-nationalistic, religious and cultural experiences. We shall come back to assess the validity of that argument later. But then it is sufficient to state that, if contemporary disquisitions in western jurisprudence are anything to go by, then it can be stated that contemporary legal positivism is beleaguered by serious problems of internal divisions with respect to the separability thesis. Thus, if the thesis of Oladosu's paper is the endorsement of legal positivists' separability thesis, the question is: which of the positivists' thesis on the connection between law and morality are we projecting? Is it the thesis of inclusivism or the thesis of exclusivism?

In obvious terms, it can be said that legal positivism has never been the same after H. L. A. Hart. The ambiguity that rocks the positivists' separability thesis is bound to affect the basis for the adoption of legal positivism for Africa. The ambiguity makes the thesis of positivism as unstable as ever. The nature of the disagreements

amongst positivists is still unsettled and leaves the contention of contemporary legal positivism on the relation between law and morality very uncertain.

Even in the face of these differences, it is still to be understood that one legal position would not solve the problem of inconsistent characterisation in Africa's legal charter. Trenchantly, flexibility stands as a unique solvent for the problem of diversities. Even in the face of diversities, what is needed is a system that endorses and accommodates pluralism in the demand for and necessity of unity.

Apart from this, Oladosu's compelling pragmatic reasons for the adoption of legal positivism for the African situations has not answered the question 'how does legal positivism create norms and standards that are indeed suitable and appropriate for all cultures?' Interestingly, the important question is not just of domination but that of accommodation. This is because if it is true that there are differing ethno-national and cultural feelings and standards among African groups, then there is the strong possibilities of not only increasing contacts between them but also conflict between groups. Holding to one legal standard that does not admit of change in the light of the interests of the groups in question would not be a problem-solving theoretical approach.

Indeed, Oladosu's paper is one of the several manifestations of the concerns and pretensions of traditional philosophy: the excessive desire for and obsessive demand for unity in the face of local and cultural, contextual possibilities. More importantly therefore is the view that an African postmodernist critique of Oladosu's position should not be found to be out of place. How would a postmodernist react to a position that cleverly vitiates the tremendous power that lies in recourse to plural, local and immanent conditions?

Besides, a feminist, possibly an African, may find the separability thesis[54] quite unappealing since it endorses what most feminists find mind-boggling in existing conceptual and legal frameworks - the separation of the public sphere from the private sphere where the public stands for the realm of the law and the private the realm of morals. The realm of the public which is the realm of the law and that of politics stands for and constitutes the strongest bastions of male domination while the private stands juxtaposed to the public and hence, the domain of feminine characteristics. The salience of this analysis is captured in the opinion of Jean O'barr. According to him,

> *Law... constituted one of the strongest bastions of male domination... Law... had its origins in trade and philosophy and thus belonged to traditionally male spheres of politics, business, and finance. Moreover, law played critical role in the construction and maintenance of modern values and systems of regulation, a role not to be overlooked when questioning the rationale for men's vigorous efforts to restrict women's access to this profession.*[55]

As much as a lot of merit lies in Oladosu's position, it tends to present a picture of legalism in Africa in a way that is contrary to factual historical construction. The question is this 'isn't it true that Africa, in the face of these diversities, had always had a system of law quite underrepresented in western jurisprudence?' Our conclusion simply is this that the African case for legal positivism as presented in

[54] The separation thesis is one of the problems that feminist jurists find mind boggling and unappealing in the whole system of masculine jurisprudence. Regardless of the split in masculine jurisprudence along the line of legal liberalism and critical legal theory, both theories of masculine jurisprudence accept the separation thesis which is the view that human beings are materially and physically separate from each other, a fact that is fundamental to the origin of law. See Robin West, "Jurisprudence and Gender" in *University of Chicago Law Review*, 1988, 55, 1. However, the separation thesis that feminist jurists find inadmissible is different from the separability thesis upheld by positivists. But then, the understanding of the separation thesis could help us understand the limits of the separability thesis as expounded by legal positivists. This is because the separability thesis as advanced by positivists is one of the dominant themes of the jurisprudence of modernity as they have developed out of the Enlightenment with a later infusion of positivist-empiricist principles, principles that have made the law to see itself as an instrument that upholds the values of objectivity, neutrality, rationality and fairness. The truth is that both theses of separation are not coherent reaction to the existential dilemma that women face and as such does not recognise nor protect the fundamental contradiction that characterises women's lives. The reason is that both have their base in the idea of law and in legal doctrine in general.

[55] Delamotte, E. C., Meeker, N., and O'Barr, J.F. *Women Imagine Change A Global Anthology of Women's Resistance from 600 B.C.E. to Present* New York: Routledge, 1997, p. 172.

Oladosu's position paper is only a recommendation or suggestion but not in real terms, a description or narration of what Africans, even in the light of plurality of systems, in actual fact believe or subscribe to. The appeal to the heterogeneity of cultures does not in actual terms vitiate the power of inseparability that they endorse. In very clear terms, to suggest separation is one thing and to describe what they do and nothing more pretentious, is a different thing altogether.

Practices that actually exist cannot be denied of their concrete existence. It is a different thing altogether if it is the case that there is the absence of that practice. In this case, it is a proposition unlikely to be contested that, observable in almost every African cultural system is the subtle acceptance that ideals of law must coincide in the main with the tenets of justice. But then why they hold unto such view of inseparation even in the light of their many differences is equally a different inquiry altogether.

The agenda of an African jurisprudence represents the differing social and cultural environment that defines the African mind. Western jurisprudence can also be described as consisting of views about law which defines the western mind. This distinction is very crucial since it determines, in a very important respect, the way law is conceived and perceived in the ultimate metaphysical sense. If it is true that indigenous systems of laws were in existence before and during the time of European contact with Africa, the history of clashes and conflict between these systems of laws is a pointer to the fact that, at the level of conception, African jurisprudence represents a prism of reality and life different from European law.

One particular instance of the agenda of African jurisprudence that sets it apart from western jurisprudence can be usefully pointed out in the opinion of Riddall on the connection between law and morality. For Riddall,

> *So closely may law and morality be intertwined that in some societies the two may be regarded as not forming separate notions. In the societies of the western world, however, the two spheres have generally been seen, notwithstanding the numerous interrelationships, as concepts that are distinct."*[56]

If nothing is gained from Riddall's submission, this does not appear elusive: that it is important to be clear-sighted about what culture comes into play in the interpretation of legal concepts. Malinowski's conclusion on the nature of law can be cited to buttress this analysis.

According to Malinowski, law can be said to comprise a broad and relatively undefined range of efforts to maintain social order.[57] In this sense, it can be argued, in line with M. G. Smith, that law is one of the institutional systems that is common to all societies whatever their developmental level.[58] However, for Malinowski, even though law represents a range of efforts to maintain social order, law differs from society to society. The basis of Malinowski's contention consists in the fact that how to maintain social order, for instance, varies with and depends on the nature of social organisation prevalent within that society.[59]

It is from these that we take the position that African jurisprudence cannot be interpreted in the light of legal prisms emanating from the west. It stands on a unique pedestal contrary to experiences in the west. African jurisprudence cannot be represented using the prism of existing thoughts in mainstream jurisprudence. The existence of African jurisprudence should not be presupposed on the material facts and features inherent in a legal economy that is contemptuous of African philosophy of society especially in the era of immediate contact.

---

[56] Riddall, op. cit. p. 295.
[57] Malinowski, Bronislaw *Crime and Custom in a Savage Society*, London: Kegan Paul, 1926.
[58] Smith, M. G. "Institutional and Political Conditions of Pluralism" in *Pluralism in Africa*, L. Kuper and M. G. Smith (eds.), Berkeley, Los Angeles: University of California Press, 1969, p. 35. the other institutional systems that are common to all societies whatever their developmental level, apart from law, according to Smith are marriage, economy, family, kinship, education, religion, and government.
[59] Malinowski, Bronislaw *Crime and Custom in a Savage Society*, London: Kegan Paul, 1926.

In very trenchant terms, it is not preposterous to contend that African jurisprudence exhibits a culturally different character when juxtaposed with western jurisprudence. For one thing, the absence of African thoughts on the idea of law in canonical works in mainstream jurisprudence is a proof that separation of thought implies separation and distinctiveness of culture and hence of world views borne out of different conceptual frameworks of life. This may well apply to the phenomena of law just as it applies to every other area of law.

Again, the very success of the African philosophy project stems from the fact that there could be one more perspective from which philosophy can be viewed in the light of the totality of ideas and thoughts in the world. African philosophy has been able to build its edifice of success based solely on the fact of cultural uniqueness. The same may be said of its jurisprudential dimension. Law is not just an attribute of human corporate existence; it is also a cultural phenomenon admitting in its trail the characteristics of cultural uniqueness.

Even where it is agreed with Smith that law constitutes one out of the several institutions that are common to all societies whether advanced or simple, it behoves us to point out that these institutional systemic arrangements of all societies are still to be distinguished, from one society to the other, in terms of their social relations and cultural distinctions. Even though culture and society may be found to exhibit a kind of tendency towards congruency in their institutional basis, there exists a kind of independent variation between them.

The fourth position is that of scholars who contend that African Jurisprudence embodies and incarnates a very substantial aspect of African life, and for that matter, not only exists but also displays and manifests a basic reality that is unique and materially authentic. This position is replete and reflected in the works of scholars

such as Max Gluckman,[60] T. S. Elias,[61] P. Bohannan,[62] Omoniyi Adewoye[63] and A. Allot[64] to mention but a few. Their arguments on the existence and reality of African jurisprudence consist in an indirect form of attack on the denial of African jurisprudence. Elias, for instance, posits that except for the differences in social and cultural environment, law know no differences in race or tribe as it exists primarily for the settlement of disputes, and, the maintenance of peace and order in all societies.[65]

In corroboration of this position, Max Gluckman wrote that the denial of African conception and system of laws is a great mistake stemming from a tradition imbued with enough ignorance about how the law works and thinks among Africans. In his words, "Africans always had some idea of natural justice, and a rule of law that bound their kings, even if they had not developed these indigenous conceptions in abstract terms."[66] Making an improvement on what was echoed in Gluckman's views, Elias, in a very provocative style, provided a convincing platform on which the abstract purity of African jurisprudence can be best understood. According to Elias "the two chief functions of law in any human society are the preservation of personal freedom and the protection of private property. African law, just as much as for instance English law, does aim at achieving both these desirable ends."[67]

---

[60] Gluckman, M. (ed.) Ideas and Procedures in African Customary Law, Oxford, 1969; Gluckman, M. Judicial Process among the Barotse, Manchester, 1967; Gluckman, M. Order and Rebellion in Tribal Africa, London: Cohen and West, 1963; Gluckman, M. *Politics, Law and Ritual in Tribal Society*, 1977.

[61] Elias, T. O. "Towards a Common Law in Nigeria" in *Law and Social Change in Nigeria*, Lagos, 1972; Elias, T. O. *Government and Politics in Africa*, 1963; Elias, T. *The Nature of African Customary Law*, Manchester, 1962; Elias, T. O. *The Impact of English Law on Nigerian Customary Law*, Lagos: Ministry of Education, 1958.

[62] Bohannan, P "Differing Realms of the Law" (1965) 67 *American Anthropologist*, No. 6, Part II 33.

[63] Adewoye, O. *The Judicial System in Southern Nigeria, 1854-1954*, London: Longman, 1977; Adewoye Omoniyi, "Proverbs as Vehicle of Juristic Thought Among the Yoruba" in *Obafemi Awolowo University Law Journal*, January & July 1987.

[64] Allot, A. *Essays in African Law*, London, 1960; Allot, A. *The Future of Law in Africa*, London, 1960; Allot, A. *The Limits of Law*, London, 1980.

[65] Elias, Teslim *The Nature of African Customary Law*, Manchester: 1956, p. 6

[66] Gluckman, M. *The Ideas in Barotse Jurisprudence*, 1972, p. 173

[67] Elias, Teslim *The Nature of African Customary Law*, Manchester: 1956, p. 33

Whether what is regarded as African jurisprudence really exists and of intellectual significance can only be treated quite soundly and answered quite correctly when we ponder on the nature and content of African traditional institutions from which their conception and reasoning on the nature of law can be deciphered. But then, to contend that African jurisprudence exists in the sense in which the Indians, the Chinese, the Americans and the British talk about their own jurisprudence is not a misnomer. It is not mere abstraction and senseless prejudices to contend that one of the creamy and interesting flavours of mainstream jurisprudence and legal philosophy is the ascription of certain distinctive qualities and characteristics which tend to distinguish one frame of jurisprudence from another.

In German law, for instance, jurisprudence is more or less synonymous with law taken as an object of scientific study. As an Anglo-American term, jurisprudence is understood to represent the various aspects of the theoretical study of law. In French legal history, jurisprudence stands for the jurisdiction of the courts both as the interpreter and developer of its several codes.[68] A major exponent of this sociological idealism in French jurisprudence was the French jurist Francois Geny. According to Geny, it is impossible to interpret the French code according to strict logic. Rather, such codes are to be interpreted in the light of the realities of social life. In one word, the dominating principle in guiding the court must be the balance of interests concerned.

Derivatively, proponents of an existent African jurisprudence seem to have in mind the picture of law in African societies that are in contra-distinction to Western jurisprudence. Murungi points out the distinction between African jurisprudence and Euro-western jurisprudence in the following terms. In his words,

[68] W.G. Friedmann, *Chamber's Encyclopaedia* New Revised Edition, Vol. 8, London: International Learning Systems Corporation Limited, 1969, p. 157.

> *...the conventional modern Euro-western literature on jurisprudence does not fully address what is at stake in jurisprudence. For the most part, jurisprudence in this literature concerns itself with the nature of law, the validity of law, the nature of legal obligation, the sources of law, the hermeneutics of law, the administration of law, the types of legal regimes, and so on...this conception of jurisprudence is derivative. What is elemental in every jurisprudence is the conception of being human that is presupposed. It is precisely for this reason that it is herein claimed that African jurisprudence is what is at stake in being human for Africans. If jurisprudence is to be understood as a science, it is to be understood, in its African context, as a science of being human as understood by Africans.*[69]

It is from the possibility of cultural distinctness, perhaps, that it is believed that the salience of the African jurisprudence project in the light of the problematic of the relation between law and morality can be ferreted. For example, when Justice Holmes conceived of the predictive theory of law, he spoke so convincingly of the American context in as much as it is evident that no other culture in the world equals the record of the American people in terms of the high sense of celebration and importance attached to the courts. This is different from the other shortcomings of the predictive theory of law. In fact, Justice Holmes' 'bad man' is typical of the American scenario.[70]

Murungi's opinion seems to connote the view that some of the controversial topics in Euro-western jurisprudence do not fully address what is at stake in jurisprudence. But this cannot be true. The question is: what is really at stake in jurisprudence? As far as those topics are concerned, in the critical sense, it is our conviction that a proper understanding of the implications of those problems actually touches on no other thing but our different conceptions of what it is to be human and how to be treated in whatever social or political contexts man finds himself.

It is a factually correct, and perhaps true, proposition that no one conception of what it means to be human prevails. In actual fact, the conception of being human

[69] Op. cit., p. 523.
[70] See Idowu, W. "The 'Bad Man' and the Law: Critical Reflections on Jurisprudence and the Inseparability Thesis" in *Abia State University Law Journal*, Vol 8, 2003, pp. 58-74.

may be different from a particular jurisprudence to another jurisprudence in the material and conceptual senses but it is still a valid claim that one of the ways by which our different perceptions about humanity or being human is defined and definable is the concepts we use in asserting, describing and appraising those perceptions.

One of the important indices for measuring and assessing those contexts and their implication for man is the nature of law and norms existent within that context. And this explains why there have been difficulties in arriving at a universal conception of law simply because it is man that is involved in the reflection over such concepts and besides, it is because of man, for the sake of man and for the ultimate value attached to man and his place in the universe that such perplexities in the conception of law and social norms have continued to persist. One of such enduring perplexities is the exact relation between law and morality.

No other subject matter of jurisprudence seems to be of significance for our conception of what it is to be human other than what humans in every context (both social and political) hold the relation between law and morality to be. In fact, to be human is to be moral and an appropriate conception of morality enters very well into our conception of what it is to be human.

In all, however, what has not been of pertinent interests and a perennial issue in the advocates of the existence of African jurisprudence is the timely and topical relevance of African jurisprudence to existing debates and problems in mainstream jurisprudence. This is why, for example, that in the arguments of the proponents of an African jurisprudence, much intellectual energy has been expended on the proof for the existence of African jurisprudence rather than a critical and an enlightened

disquisition on the salience of African legal philosophy in the light of existing problems in legal philosophy.

It is in the light of this, that we attempt a brief analysis of the problem of canonisation of African jurisprudence in the annals of the history of general jurisprudence. It is believed that a critical analysis of the problem of canonisation will pave way for a concise and critical approach on the nature of African jurisprudence. The question then are: what is the importance of canon formation and canonisation for African jurisprudence? Does the problem of canon formation explain the absence of African legal philosophy? Despite the problem of canonisation, what can we call the attributes and conceptions of African jurisprudence? These are the issues that the remainder of this chapter seeks to address.

3.5 ON THE NON-REPRESENTATION OF AFRICAN JURISPRUDENCE IN JURISPRUDENTIAL LITERATURE

The difficulty of representing and picturing African legal tradition in its various philosophical, cultural and anthropological expressions is emphatically not a new enterprise in African philosophy and African studies. That the African philosophy project, of which African jurisprudence is an integral part, is a success can be consented to entirely without any modicum of doubt. But then, any serious scholarship on the place of law in African realities must of necessity raise questions about prevailing concepts and theoretical approaches. This is as a result of the fact that the architectural furnishings of jurisprudential and legal researches have been by and large distilled from Europe and American experiences.

The questions, however, are why is Africa's complex historical and cultural experience, particularly in the idea of law and jurisprudence, not fully represented in the current corpus of canonical works? Could it be in the inherent nature of

canonisation? Is canon formation necessarily ideological and racially inclined? What is canon formation? How do we conceptualise the notion of canon?

3.5.1 THE CONCEPTS OF CANON AND CANON-FORMATION

In the basic sense, the concept of canon can be described as a piece of work or art that is repeatedly referred to in a given discipline. In precise terms, it refers to a great work that survives all times and ages, because it is a class by itself or of first rank and of acknowledged excellence. Canon-formation, therefore, is the process or avenues by which these great works or arts in any discipline for that matter have come to be preserved. The process in question may be ideological, cultural, historical or even political. The respective figures often projected in this process of canon formation are most often referred to as titans or iconoclast.

According to Adeoti, from its origin and practice, the concept of canon is distinguished by contradiction. In his words, the contradiction inherent in the concept of canon consists in the fact that "it implicates the existence of a set of prescribed rules by which "standard" or "correctness" in creation is created."[71]One manifestation of the contradiction implicit in the idea of canon, especially in the light of modern realities, is the fact that it elicits the idea of antagonism between the powerful centre (often projected as the standard) and the marginalised periphery (referred to in the concept of "otherness")

As a process, canon formation as argued by Robert Hallberg involves three levels of discourse: determination or selection, construction and management or governance. In the words of Hallberg,

---

[71] Adeoti, G. R. "Canonising the Hole in Africa's Postcolonial Zero: An Exploration of the Dramaturgy of Kole Omotoso", paper presented at the Codesria African Humanities Institute's International Symposium on the theme *Canonical Works and Continuing Innovation in African Arts and Humanities*, University of Ghana, Legon, Sept. 17-19, 2003, p. 3.

> *The canon collection as a whole investigates three broad questions: how artists determine canons by selecting certain styles and masters to emulate; how poet-critics and academic critics, through the institutions of literary study, construct canons; and how institutionalised canons effectively govern literary study and instruction.*[72]

Given the bi-polar structure of the global political system, it is less controversial to argue that the process or act of selection, construction and governance of canons appears highly controversial and political. This is due to the fact that presently, there are no universally and objectively given standards or criteria by which to determine which texts are to be canonised.

In the field of jurisprudence, for instance, there is no publicly governing criterion for the inclusion or exclusion of some text or conceptions of law. In fact, the general form of representative texts in the field of jurisprudence makes canon formation an ideological thing i.e. a projection of western superiority. It is within this ideological framework, as argued by Damian Opata, that "canonicity intermeshes with politics and the cultural capital that both grounds and projects it.[73]

The canons in legal theory and jurisprudence include Plato's ***Republic***, Aristotle's ***Politics***, Hobbes' ***Leviathan***, Locke's ***Second Treatises of Civil Government***, Rousseau's ***Social Contract***, Aquinas' ***Summa Theologica***, Bentham's ***Jurisprudence***, and a host of others. In modern times, scholars such as H.L.A. Hart, Joseph Raz, Neil MacCormick, John Finnis, Lon Fuller, Ronald Dworkin, have all in one way or the other enjoyed eminent canonisation. It stands out clear as an obligation on our part to unravel the basis of the peculiar absence of African resonance in

---

[72] Hallberg, R. *Theory as Resistance, Politics and Culture after First Structuralism*, New York: The Guilford Press, 1994, p. 5.

[73] Opata, D. "Gender and Canon Formation in Nigerian Literature in English: A Search for a Useable Past" paper presented at the Codesria African Humanities Institute's International Symposium on the theme *Canonical Works and Continuing Innovation in African Arts and Humanities*, University of Ghana, Legon, Sept. 17-19, 2003, p. 4.

jurisprudence and legal philosophy. The question is what accounts for this perennial non-representation or under-representation?

3.5.2 EUROCENTRISM AND THE DILEMMA OF AFRICAN JURISPRUDENCE

Looking across the broad panorama of philosophical and legal traditions, there have been series of responses in relation to the 'unrepresentative' nature of the import and substance of African theory of law in general jurisprudence. Our concern here is with a critical analysis of some of the perceived notions about the salience of African jurisprudence. There are at least three sets of factors that are generally adduced in any meaningful, scholarly work, as having contributed to the unrepresentative nature of African legal theory in general jurisprudence and legal scholarship.

The first derives from the alleged question or fact of ignorance about the ability of the African to ratiocinate and thus engage in conceptualising the notions of law or even any subject of intellectual endeavour for that matter. The second stems from what is often regarded as the absence of any written work of intellectual worth. The third stems from what can be regarded as the resilient paradigm of cultural, anthropological prejudice about African realities of life.

While not contending that these reasons are irrefutable, our view is that a rebuttal to each of the arguments shows that general, mainstream jurisprudence represents and depicts a bend towards a Eurocentric historiography which tends to define the past in the light of its history. In this light, it is thought necessary to have a critical look at the presuppositions on which each of these views is based in order to establish where they do not really capture the heart of the matter.

About the best capture of the heart of the first two factors hinted at above is that proffered by T. O. Elias and A. A. Allot. For both scholars, African legal theory appears underrepresented in the body of works and thoughts in general jurisprudence arising from ignorance in the first instance and the problem of written records. Essentially, there seems to be a connection. According to Allot, for instance, silence about African law stems from the opinion of ignorance by outsiders who lack sympathy and knowledge. In his words,

> *Some deny the character of law to Africa altogether; others declare that, if there were legal rules in African societies, those rules and their administration are or were characterised and dominated by belief in magic and the supernatural blood-thirstiness and cruelty, rigidity and automation, and an absence of broader sentiments of justice and equity.*[74]

For Allot, these expressions of ignorance about African law have been partial for two reasons: in the first instance, such accounts only tell part of the story and secondly, their expression concerning these sets of laws apparently have been coloured, consciously and unconsciously, by one form of prejudice or the other.[75]

On his part, Elias attributes the ignorance, and hence, the under-representation of African legal theory to three factors: the predominance of missionaries in the field of education in Africa; the imitation of western mentors by educated African elites concerning their own societies and their place in it and; the absence of political consciousness, pride of ancestry and cultural heritage on the part of the African.[76] But then, as argued before, to be ignorant of an entity does not preclude the existence of that thing nor does it deny it of vitality and the substance that it has.

[74] Allot, A. *The Future of Law in Africa*, London, 1960, p. 55.
[75] Allot, A. *The Future of Law in Africa*, London, 1960, p. 55.
[76] Elias, T. O. *Government and Politics in Africa*, 1963, pp. 7-9.

More precise, however, is the view that the recourse to ignorance as a potent factor in the under-representation of African legal theory does not capture the merit of its absence. As a matter of fact, the display of ignorance about African realities projects more than the absence of superlative knowledge about Africans and their world view. Our speculation is that ignorance does not seem to lie all alone in this task. It has a connection and counterpart in the projection of ideological and cultural superiority that, for us, is aptly traceable to the kind of historiography that Western jurisprudence subscribes to.

But then, analysis must go beyond this. Clearly related to the above is the issue of the absence of written records about African legal realities. Elias sums it up in the following observation. According to him, "the absence of writing has therefore deprived the Africans of the opportunities for recording their thoughts and actions in the same systematic and continuous way as have men of other continents."[77] Interestingly, this factor has commonly been appealed to in the denigration of not only African legal worldview but also philosophical reasoning. The question is must a body of thoughts about law (or any other field of human endeavour) be written before ascribing a jurisprudential nature to it?

However, the peculiarity and absurdity of this argument can be located in the terse but profound statement that if you are not able to theorise, you will have nothing to write down. Although you may be able to theorise, and may in fact theorise, without recording the theories. Hence, the absence of the former precludes the latter, but not vice-versa.

[77] Elias, T. O. *Government and Politics in Africa*, 1963, p. 21.

But then what is yet to be explored in the critical sense as a credible explanation for the under-representation of African jurisprudence in systematic reflection on general jurisprudence, for us, is the peculiar historiography which the western world cooks up for itself. It is believed that Eurocentrism has a peculiar historiography that is antithetical to African realities. It is this Eurocentric historiography that calls for urgent analysis and critical assessment altogether. Imbued in this kind of historiography are relentless racist and sceptical attacks, often justified by the invention of curious and spurious philosophical arguments and reasoning, on African realities.

Eurocentrism, both in its present and past forms, relies heavily on the development of what Grosz calls positive historiography in demolishing the rich influx of non-western ideas. Just like positivist historiography, which interprets the past in its own image, in a similar way, Eurocentrism has interpreted American-European values, relations and conceptions in law, jurisprudence, morality, justice in non-western (pre-modern) societies as lacking and incomplete as compared to positivism which Western society sees as the apex of development as far as relations in jurisprudence and conceptions of law are concerned.

The epistemological implications and fallout of positivism especially as championed in science breeds, imperceptibly, a kind of anthropological scepticism and racism. "Europeans," claims Hopkins, "equated standard of morality with standard of living, and they found both wanting in Africa."[78] This position can also be buttressed by the observation of Kristin Mann that "the new faith of Europeans in the moral and

[78] Hopkins, Anthony "Property Rights and Empire Building: Britain's Annexation of Lagos, 1861", *Journal of Economic History*, 1980, 40(4), pp. 778-798, at p. 778.

material superiority of their own civilisation convinced them that exporting their culture would be good for Africans.[79]

The question is what can be made out of these observations about the nature of legal interaction and encounter between Europeans and Africans? The implication on African law is decisive and only a critical reflection can portray its significance for African law. Reflectively, what appears obvious is that beneath western jurisprudence is a kind of equation of jurisprudence with economics. Beneath every jurisprudence is an economic world view. The absence of such economic worldview is an indication that a jurisprudence is absent. More importantly, since law was very instrumental to the establishment of colonialism, and colonialism was fuelled and informed by the material and moral superiority of Europe, it follows that European laws were held to be distinguished and culturally superior to African law. As a matter of fact, law played a central role in the on-going process of cultural and political reform.

Trenchantly, what is suspected as responsible for the varying shades of the evils of Eurocentrism is the view that it subscribes to a positivist historiography that defines the past by its own image, and denies to Africa a distinct history. This inevitably leads to the absurd conclusion that realities, conditions, perceptions and values in non-western societies are inherently lacking and incomplete when compared to western society seen as the apex of development. The denial of a past to Africa is often cast in various ways. In the first place there is the myth that Africans do not have a distinct history apart from the history of their contact with the West. This myth about Africa has been given serious ideological attention in canonical works in an attempt to establish the difficulty of the African condition. According to this myth, Africans are not only denied a past, but secondarily, whatever history or past Africans

[79] Mann and Roberts, *op. cit.*, p. 11.

have, can be fruitfully considered as part of the history of Europeans in Africa. The Oxford historian Professor Hugh Trevor-Roper asserted a notorious variant of this feeling in the West about Africa in 1962 when he said:

> *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.*[80]

Earlier, in an address of 1854 to the American Colonisation Society of which he was vice-president, Commander Andrew H. Foote of the United States Navy contended that:

> *If all that Negroes of all generations have ever done were to be obliterated from recollection for ever the world would lose no great truth, no profitable art, 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.*[81]

Such prejudicial assertions about the African past are not only mythical but also empirically false. This, however, is one of the most fundamental of all the myths and is so strong because African slaves, as dishonoured people, were stripped of their history and the dignity and pride that accompanied it.

But then the falsity of this assertion lies not only in the fact that it is a myth but also in the fact that it is never in conformity with the structure of the universe whether past or present. In fact, ancient civilisations had the hub of their activity and operations built and constructed around African cultures, empires and kingdoms. For example, the history of Egyptian civilisation not only validates the promise of the African past and history, but also proves the point that philosophy, as a speculative enterprise, had its emergence and commencing point in Africa. It is appealing and acceptable to us to think that African jurisprudence is not excluded from this early philosophical promise in Africa.

---

[80] Hugh Trevor-Roper, *Rise of Christian Europe* (London: Thames and Hudson, 1964), p. 9.
[81] A. H. Foote, *Africa and the American Flag* (New York, 1854), p. 207.

The significance of ancient Egyptian history, civilisation and kingdom for African history is three-fold: one, it shows that Africans have a distinct history that is their own; two, it shows that African history is as valid as any other history in the world; three, it proves the point that African history (and philosophy) has always had a strong connection, not dependence, with other continents, chiefly with Europe, since the Greco-Roman world.[82]

Furthermore, the history of Christianity, the Greco-Roman era and the African thinkers it produced, such as Origen,[83] Tertullian and Augustine, to mention just a few, proves not just the validity of an African past and history but the fact that these thinkers were Africans in the actual sense.[84] The importance of this consists in the view that during the Greco-Roman era, interest in Africa was not just a possibility but an actuality. As argued by Masolo, "the history of Christianity in its nascent stages...reveals to us the African input in the making of Christianity.... These great Africans helped define some of the basic tenets of Christianity."[85]

However, there have been multifaceted fundamental objections to this claim of an African connection with Egyptian civilisation and history. The actual statement of the objection is the view that Egypt is not Africa and not part of Africa. Therefore, any claim of connection is self-defeating. Another variant of this objection is the view that when Africa is mentioned as not having history, Black Africa is the reference point, with Egypt or any other country in the north of Africa excluded. In all these, in

---

[82] See Theophile Obenga, "Egypt: Ancient History of African Philosophy" in Kwasi Wiredu, ed., *A Companion to African Philosophy* (Malden, MA: Blackwell Publishing, 2004), p. 31.

[83] Eminent historians, commentators and classical texts consider Origen to be an African. See J. J. I. G. Dollinger, *History of the Church*, trans. Rev. Edward Cox (London: C. Dolman and T. Jones Publishers, 1840), pp. 40ff.

[84] From antiquity, North Africa had been home to many indigenous African peoples such as the Berbers. The African root of these thinkers had been traced to the singular fact that they were Berbers living in North Africa which was a playground of both Roman imperial politics and Greek intellectual traditions. See John Ferguson, "Aspects of Early Christianity in North Africa" in Lloyd A. Thompson and J. Ferguson, eds., *Africa in Classical Antiquity, Nine Studies* (Ibadan, Nigeria: Ibadan University Press, 1969), p. 184.

my opinion, Hegel's version of the story appears more radical and notorious than others. There are, however, two dimensions to Hegel's opinion in relation to this work.

The first concerns his denial of African history and the second relates to his denial of significant philosophical development and achievement by Africans. The second dimension will be treated later in the work. In his philosophical history of the world, Hegel wrote that

> *Africa proper, as far as History goes back, has remained—for all purposes of connection with the rest of the World-shut up; it is the Gold-land compressed within itself—the land of childhood, which lying beyond the day of history, is enveloped in the dark mantle of Night. Its isolated character originates, not merely in its tropical nature, but essentially in its geographical condition.*[86]

In another light, Hegel concluded about the Africa-Egypt question that:

> *Africa must be divided into three parts: one is that which lies south of the desert of Sahara—Africa proper—the Upland almost entirely unknown to us, with narrow coast-tracts along the sea; the second is that to the north of the desert—European Africa (if we may so call it)—a coastland; the third is the river region of the Nile, the only valley-land of Africa, and which is in connection with Asia.... Egypt...does not belong to the African Spirit."*[87]

The question, at this stage, is how logical and true to facts are the claims and submissions of Hegel about African history including the Africa-Egypt question? Our observation is that much of what is loaded in Hegel's claim is tastelessly deliberate and a premeditated prejudice. The racial engineering and separabilism between Egypt and the rest of Africa conjured here in Hegel's philosophy only lends credence to the common saying that when you cannot find the world you want, you can always create it. It is pertinent to contend that Hegel's separability thesis on Africa and Egypt does not correspond to facts and details. A critical reflection on facts will bring out the absurdity of the claim. Indeed the falsity of Hegel's claim can be seen in the unanimous agreement of over twenty of the best Egyptologists during an international

---

[85] D. A. Masolo, "African Philosophers in the Graeco-Roman Era" in Wiredu, p. 62.
[86] G. W. F. Hegel, *The Philosophy of History*, trans. J. Sibree (New York: Dover, 1956), p. 91.

symposium organised by United Nations Educational, Scientific and Cultural Organisation (UNESCO) held in Cairo in 1974.

The following submissions of the symposium doused the almost one hundred and fifty years' racial commentary of Hegel about Africa. Evidently, it is not how long a view has been peddled that makes it true. A clue to its understanding may be the source, the mindset and the socio-political context in which it was shared, received and propagated. After all, the duo of Kepler and Copernicus unravelled the falsehood inherent in the Aristotelian science that held sway for over one thousand years.

In the first place, Black Africa and Egypt share a similar linguistic community. In other words, Egyptian language as revealed in hieroglyphic, hieratic and demotic writings and modern African languages as spoken nowadays share some affinity when seen and closely observed in their several parts. And it is yet to be proved, scientifically, that the Semitic, Egyptian and Berber languages have not descended from a common ancestor.[88]The foundation of this opinion lies not in its truth but in the fact that it is appealed to by many, which is, speaking in terms of critical thinking, argument and evidence, one of the incredible instances of *argumentum ad populum*, i.e. appeal to popular opinion.

Secondly, according to the submission of that symposium in 1974, ancient Egypt was not located in Asia Minor nor in the Near East but was essentially an African civilisation going by the manifestation of its spirit, character, behaviour, culture, thought, and deep feeling.[89] In essence, it is an agreed historical fact that Egyptian civilisation of the Pharaonic period, i.e. 3400-343 BC, was an essentially African civilisation. This cannot be removed from the rest of African history. It is a different argument to contend that African history and past is full of darkness. Even if it were

[87] Ibid., p. 99.
[88] Obenga, 32.

true, for the sake of argument, that "darkness" remains the larger percentage of the African past, it is still a fact that darkness is part of history. The African past can be defined in terms of distinct episodes, and varying patterns of history and memory the African has about himself.[90]

Besides, Hegel's conclusion about African history and the Egypt debate was neither a product of intense historical research nor born out of deep moments of pure historical observation, scientific investigations, experiments and experience. It was basically a product of prejudiced philosophical history which is informed by a particular mindset. Prejudices are born in the minds of men and as such may be heavily situational, circumstantial and contextual. By the same token, it is from the mind that one begins the curative process.

Regardless of the racial colouring that is often brought to bear on the intellectual comprehension and significance of the African past, we cannot arrive at a universal theory of the history of man in general without an apt reckoning of the African phase and dimension in man's total existence. As argued by Lewis Taylor, "no empirically sound general theory of society can be elaborated unless account is taken of every known form of man's existence in society."[91]The African person and mind, it is not preposterous to argue, is not a modern or European invention but a product of a particular, distinct and significant history.

Apart from the Hegelian myth denying the usefulness of African past, there is another equally fabulous coinage of African life. Stated succinctly, it classifies the African cast as having no literary or philosophical significance for general

---

[89] Ibid., 32-33.
[90] Idowu, W. "Social History, African Identity and the Memory Theory", *The Anthropologist* 5.4, pp. 237-245, at p. 244.
[91] I. M. Lewis, "Tribal Society" in *Encyclopedia of the Social Sciences* (New York: Macmillan and Free Press, 1968), p. 150.

jurisprudence and any intellectual activity for that matter. This myth has a long history. It is equally untrue in the light of the history of the world. Unfortunately, this myth has its foundation in the works of many great Western philosophers whose philosophical temperament have been coloured by racial prejudice. The Hegelian version has been pointed out earlier. But then there are more dimensions to this mythic portrayal than Hegel's.

Of central interest is the racist thought of David Hume in the eighteenth century. Hume had contended very strongly in one of his classical works the denial of any item of great significance among the Negroes. In his words,

> *I am apt to suspect the Negroes and in general all the other species of men (for there are four or five different kinds) to be naturally inferior to the whites. There never was a civilized nation of any other complexion than white, nor even any individual eminent either in action or speculation. No ingenious manufactures amongst them, no arts, no sciences....there are Negroe slaves dispersed all over EUROPE, of which none ever discovered any symptoms of ingenuity; tho' low people, without education, will start up amongst us, and distinguish themselves in every profession. In JAMAICA indeed they talk of one negroe as a man of parts and learning; but 'tis likely he is admired for very slender accomplishments, like a parrot, who speaks a few words plainly.*[92]

However, the obvious inconsistency in the thoughts of David Hume concerning human nature in general can be demonstrated by the fact that five years before he made the assertion above, Hume had written that human nature with respect to mental attitudes, cognitive abilities and dispositions knew no bounds or distinctions. In his words,

> *It is universally acknowledged that there is a great uniformity among the actions of men, in all nations and ages, and that human nature remains still the same, in its principles and operations. The same motives always produce the same actions: the same events follow the same causes. Ambition, avarice, self-love, vanity, friendship, generosity, public spirit: these passions, mixed in various degrees, and distributed through society, have been, from the beginning of the world, and still are, the source of all the actions and enterprises, which have ever been observed among mankind. Would you know the sentiments, inclinations, and course of life of the Greeks and Romans? Study well the temper and actions of the French and English.*[93]

---

[92] David Hume, *Philosophical Works*, vol. 111, pp. 228-229.
[93] David Hume, *An Inquiry Concerning Human Understanding* (Buffalo: Prometheus Books, 1988), pp. 77-78.

It is to be noted that Hume became an infamous proponent of philosophical racism when the slave trade was going in England and his racial outbursts at that time were used by racists to justify the slave trade. What is of interest and curious to us is that Hume's philosophical racism and the very basis on which it stands are at variance to his avowed principles of empiricism which are experience and observation. In fact as argued by Eric Morton, Hume's views about Africans and Asians had no empirical foundation. In Morton's words,

> *Hume's notions about Africa and Africans, Indians and Asians were not based on factual, empirical information which he had gained by "experience and observation." No, his empirical methodology did not fail him nor did he fail it. The issue is that he never had an empirical methodology to explain racial and cultural differences in human nature. He only pretended that he had. I argue that the purpose of his racial law was not one of knowledge, but one of justification for power and domination by some over others.*[94]

Apart from this, emerging facts from the African continent disprove Hume's claims that "there never was... any individual eminent either in action or speculation." A careful understanding of the history of Egypt disproves Hume's claims. What is more, Ethiopian philosophy of the seventeenth century provides an excellent critique of Hume's opinion about Africa. Since the publication of Plato's *Republic*, it is said that the interests of philosophers have necessarily been drawn to the light. Ethiopian philosophy presents a remarkable show of light in the speculative thoughts of two of its ablest philosophers, Zera Yacob (1599-1692) and his disciple, Walda Heywat. According to Claude Sumner,

> *When at long last, after three centuries of quasi-oblivion, it became aware of the great light that was Zera Yacob the philosopher, it left in the dark his disciple Walda Heywat. And when the continent of Africa, nay the world at large, discovered in Zera Yacob a rationalist free-thinker, the glow of enlightenment in the shadows of the African past, it opened its arms to the original master, and left the disciple amidst the embers of the night.*[95]

---

[94] Eric Morton, Eric, "Race and Racism in the Works of David Hume" (*Journal on African Philosophy* 1, 2002), 1.
[95] Claude Sumner, "The Light and the Shadow: Zera Yacob and Walda Heywat, Two Ethiopian Philosophers of the Seventeenth Century" in Wiredu, p. 172.

In the area of jurisprudence and philosophy of law, African ideas about law effectively combined with Islamic jurisprudence to produce not just an excellent body of juristic thoughts but refined, reformulated, home-grown, indigenous thoughts on law. According to Appiah, "Muslims have a long history of philosophical writing, much of it written in Africa...."[96]In a further search for the light in the African past, Souleymane Bachir has provided scintillating examples of African scholars, beyond the prejudice of the ethnological paradigm,[97]eminent in action and speculation, contrary to the racial thoughts of Hume, in the areas of logic, jurisprudence and political philosophy.[98]

One outstanding example is that of Ahmed Baba, who belonged to the *ulama* (school of learned scholars) and who hailed from the *Bilad as-Sudan,* i.e. "the Black people's land." Ahmed Baba was reputed to have had 1600 volumes which constituted his personal library, and to have given an uncountable number of public lectures and innumerable commentaries on jurisprudence, politics and religious rights.[99]

But then, Hume is not alone in this long tradition of philosophical racism. The same can be said of the German philosopher, G. W. F. Hegel, as stated above. Hegel's philosophical racism was notorious. The pertinent question is why is there so little, if any, respect for and, as a consequence, interest in African phenomena and their philosophical resonances? The answer to the question should not consist in the notion that Africa holds no promising philosophical itinerary nor should it consist in the view that philosophy itself is not interested in what Africans think, say or do.

---

[96] Kwame Anthony Appiah, *In My Father's House: Africa in the Philosophy of Culture* (London: Methuen, 1992), p. 144.
[97] What is the ethnological paradigm in relation to Africa? According to Souleymane, it consists in the view that what is authentically African is simply assumed to be what remains once you have removed all the deposits that history has left on the continent. See Souleymane Bachir Diagne, "Precolonial African Philosophy in Arabic" in Wiredu, p. 66.
[98] Souleymane Bachir Diagne, "Precolonial African Philosophy in Arabic" in Wiredu, p. 68
[99] Souleymane Bachir Diagne, pp. 68-69.

These explanations do not portray the heart of the matter. Imbued in the peculiar absence of African phenomena from the field of philosophy, and implicitly, in the area of jurisprudence, is the politics of social history. In Olufemi Taiwo's language, the peculiar absence of Africa from the tradition of Western philosophy and jurisprudence lies in the chilling presence of Hegel's ghost and in the continued reverence of that ghost by the descendants of Hegel. In Taiwo's words,

> *I submit that one source for the birth certificate of this false universal is to be found in Georg Wilhelm Friedrich Hegel's The Philosophy of History... 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.*[100]

This can be validated in the writings and submissions of Hegel about Africa. According to Hegel the central ideas of universality and rationality do not exist in Africa: what exists is Africa's and Africans' attachment to nature which is at best an astounding display of the absence of the quality of universality and rationality. One of the promising markers of universality, according to Hegel's narrative, is the possession of transcendence. One way of describing this is what can be referred to as "the unacknowledged African being," courtesy of Hegel. Because the African lacks being, he is denied any significant achievement in world history.

This explains why no accurate representation is given of Africa in the areas of ethics, law, metaphysics and epistemology. Africa's and Africans' contribution to areas of knowledge production such as anthropology or political science have in recent times being consigned to what is dubiously called "African Studies." Even then, the metaphysic or the ontology of difference between the "supreme West" and "Africa" is

[100] Olufemi Taiwo, "Exorcising Hegel's Ghost: Africa's Challenge to Philosophy" (*African Studies Quarterly* 1.4, 1998, http://www.clas.ufl.edu/africa/asq/legal.htm)

often trumpeted. Also worrisome is the view that even where it is glaringly obvious that African scholars are at home with some of the aching questions in the field of justice, or immortality of the soul, or philosophy, their answers are often despised as having no philosophical relevance. Taiwo's language is pungent in its apt capture of the lamentation of the African mind. According to Taiwo,

> *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."*[101]

Having succeeded in banishing the African reality, possibility and past from the rest of the world, the sum of Hegel's conclusion about Africa can be pictured in the terse but profound statement that Africa falls short of the glory of man. Hegel's conclusion in this respect is disturbing. He says,

> *From these various traits it is manifest that want of self-control distinguishes the character of the Negroes. This condition is capable of no development or culture, and as we see them at this day, such have they always been. The only essential connection that has existed and continued between the Negroes and the Europeans is that of slavery ..*[102]

In significant senses, therefore, Humean and Hegelian notions and prejudice about Africa are not founded on anything empirically true—not on observation, experience or empirical history—but derive their connection from the issue of slavery and the distorted interpretations of history. Significantly, the history of slavery in relation to Africa is not a product of the un-humanity, man-less-ness and irrationality of the African mind or psyche but of the history of what Morton tags "our dependence on and dominance by others."[103]Dependence and dominance, in their full import, do

---

[101] Olufemi Taiwo, "Exorcising Hegel's Ghost: Africa's Challenge to Philosophy" (*African Studies Quarterly* 1.4, 1998, http://www.clas.ufl.edu/africa/asq/legal.htm)
[102] Hegel, p. 98.
[103] Morton, *op. cit.*, 1.

not contribute to the making of authentic interpretation of Africa's participation in history.

The problem of the twentieth century, as William DuBois conceives it "is the problem of the colour line - the relation of the darker to the lighter races of man in Asia and Africa, in America and the Islands of the Sea."[104] Beneath western historiography is the attempt to depersonalise and dehumanise the identity of the African. One of the several attempts by which this project has been carried out is the subjection of philosophical ideas and doctrines to the prevailing socio-political and economic conditions which characterise the age in which they were invented. This is no doubt true in the philosophical thoughts of David Hume and Hegel concerning the African and Africa in general.

Today, the task of constructing African scholarship in ethics, jurisprudence, philosophy and even politics through his history is not only challenging but made more intellectually stimulating given the wealth of analysis afforded by a growing community of scholars in not only interrogating what is considered as anomalous but also in unearthing the facts about the African past. In most cases, the wrong perception of African jurisprudence, for instance, stems from a deliberate neglect and misunderstanding of the symbolic and practical logic of a community viewed from the normative perspective of the community concerned. Much of this sceptical and racist trend characterised the heart of anthropological perspectives and reports emanating from the west. No empirically sound general theory of law has been and will be elaborated in general jurisprudence unless this brand of philosophical scepticism (about Africa and its jurisprudential imprint) imbued and energised by racism is done away with. Perhaps, the most credible way, shorn of racist or anti-racist polemics, is

to articulate the nature, concepts and substance of African jurisprudence as is attempted below.

3.6 THE NATURE OF AND CONCEPTS IN AN AFRICAN (YORUBA) JURISPRUDENCE

It is imperative in a discussion on the nature of an African jurisprudence that leading thoughts and hints on what Africans often take the idea of law to be must form the foundation of the analysis. And, even supposing that the work is meant for the African reader, it seems very clear that some effort should be made to bring the discussion, however perfunctory it purports to be, more pungently and pointedly. A piece on African philosophy of law, strictly so-called, could not omit a consideration of the nature of African jurisprudence, no matter how perfunctory, and still seriously contest for academic legitimacy. An excellent way of doing this is to attempt an analysis of an African jurisprudence in the light of the jurisprudence of the Yoruba people. In doing this, we shall contend that the concepts and character of Yoruba jurisprudence is assumed to exhibit, in very relevant details, some aspects of African jurisprudence in general, although not ruling out instances of dissimilarities in specific details.

3.6.1 A THEORETICAL ANALYSIS OF THE NATURE OF YORUBA POLITICAL PHILOSOPHY

In the primary sense, the social unit of the cultural setting of the Yoruba people has been similarly structured like in most other African societies. Even though, in terms of details, there may be differences in the cultural practices, in the comparative sense, a whole lot of similarities are clearly and interestingly exhibited among these different societies. Even if there are differences now in the cultural setting of these societies in Africa, one very significant interlude in this whole

[104] Dubois, W. E. B. "The Conservation of Races" in Albert Mosley, ed., *African Philosophy: Selected Readings*, (Englewood Cliffs, NJ: Prentice Hall, 1995.

interplay is the colonial dimension added to the African environment. Since colonialism represents a major alteration of the African life, a positive march towards the object of our discussion will be attained by recourse to the traditional setting of the Yoruba people.

From the beginning, it is profitable to contend that two crucial indexes are necessary in a fruitful and profitable investigation and interrogation of the nature of traditional jurisprudence as it obtains amongst the Yoruba people. The abstract nature of the traditional jurisprudence of the Yoruba people, and the distinct picture of law and morality that emerges from it cannot be successfully investigated without recourse to these two indexes. These refer to the religious and the political set-up which existed in this society before the advent of colonial imposition. Our attention shall be on the political set up from which ideas about Yoruba political philosophy is derived.

Given a more abstract and conceptual kind of analysis, four major conceptions seems to have been propounded in explaining the general character of Yoruba political philosophy and the nature of political authority in particular.[105] As discussed by Akinjogbin, these theories are the imperial theory, the Roman-Empire theory, the Original ancestor theory and the Ebi concept or theory. To reflect the substance of what is pursued in respect of Yoruba jurisprudence and the relation between law and morality, it is our conviction that a fifth theory can be developed and through which a consideration of the relation between law and morality can be viewed.

Each of these theories is not immune from certain defects. In other words, no one theory listed herein captures, in totality, the true essence of Yoruba social and

[105] These theories are extensively discussed by A. I. Akinjogbin "The Ebi System Reconsidered" in *Department of History University of Ife Seminar Series 1978-1979*, Ile-Ife: Kosalabaro Press, 1979, pp. 1-25.

political philosophy. Intellectual and scholarly expedience comes into play when the merits of each of these theories are adopted in the interpretation of Yoruba political and jurisprudential framework. Furthermore, it is quite imperative to us that there could be elements of each theory that could be accepted as valid for a scholarly interpretation of what can be said to be Yoruba jurisprudence or political or moral philosophy in general. It will be no wonder then that in the evaluation of Yoruba jurisprudence that we may be compelled to draw from the merits of these theories as advanced below.

3.6.1.1 THE IMPERIAL THEORY

In characterising and explaining the basis of political authority in Yoruba political philosophy, the first theory often resorted to is the *Imperial Theory*. The imperial theory is based and built on the political ideology or philosophy of absolutism. The evidence often cited to buttress this analysis of the entire Yoruba political life relates closely to the overwhelming power and domineering influence and popularity of the then Oyo Empire headed by the Alafin. In a nutshell, this theoretical rendition of Yoruba political life was based on what was considered to be the dynamics of the internal aspects or workings of Yoruba history and tradition. Since it stands to be denied, from a sense of history, that Yoruba political culture reflected a kind of sway on the part of the Oyo Empire, the imperial theory has come to receive a kind of theoretical approval in the interpretation and understanding of Yoruba political life. A bit of empirical historical verification can be insightful in this regard.

Politically, the traditional Yoruba societies combine effectively a host of kingdoms with a distinct ruler in charge of the respective kingdoms. According to Robin Law, the sovereigns in each of these kingdoms claim and trace their origins to

Ile-Ife.[106] However, the Oyo Empire, ruled by the *Alafin* claimed authority over the other kingdoms based on the alleged inheritance of the primacy of Oduduwa, the progenitor of the Yoruba people.[107] According to Robin Law, the hegemony of the Oyo Empire, symbolised by the *Alafin*, over other states and kingdom in the Yoruba kingdom, was justified not on the essential character of the rule of the *Alafin* but basically on the basis on which that rule was promoted.

According to Law, this relates to the distinctive dynastic seniority which the *Alafin* claims over other kings and sovereign in the wide Yoruba kingdom. This family of kingdoms principally derives from Ile-Ife, the cradle of Yoruba civilisation with Oduduwa being the progenitor.[108] Of interest is the fact that these kingdoms manifest a cultural affinity, a phenomenon that finds its utmost explanation in the fact that they bear a common ancestry. One favourable item of this similarity and cultural affinity is the sameness of social and political organisation headed by a sovereign, the king, i.e. the *Oba*.

Even though the imperial theory tends to capture the heart of Yoruba political history and particularly the relation between the different monarchs in each of the kingdoms, the extent of its carriage of truth is, however, limited. In the first instance, absolutism was not necessarily the essential life of Yoruba political philosophy. This explains why it is the case that the relationship of superior-inferior or master-servant was basically resisted by the other monarchs who saw the onslaught of the Alafin as

[106] Law, R. *The Oyo Empire c. 1600 - c. 1836*. Oxford: Clarendon Press, 1977, p. 145.
[107] Ibid., p. 145.
[108] Oshamba Imoagene (1976) classified these family of kingdoms into three types: first, the maximum hereditary restriction system of the north and north-west, i.e. the Oyo and the Ekiti kingdoms which offered full security to holders of political office through its highly restricted scope for upward mobility by the general populace. These societies were highly patrilineal. The second, the minimum hereditary restriction system of the south and south-east, i.e. the Ijebu and Ondo. An open system was the means of appointment into political offices in which both male and female lines of descent were recognised. The third, the Ibadan and Abeokuta kingdoms with a more equalitarian style of appointment provided more mobility channels for its citizens. These consisted of various grades of title holders whose political positions were not hereditary.

non-typical of Yoruba political life. Again, in another instance, the Imperial theory seems to have taken for granted and lost sight of certain institutional checks that exists in Yoruba land even over monarchical exercise of power Alafin himself. The imperial magisterial status that the theory cast around the Alafin is less deserving.

And what is more, the constant rancour and continuous clashes between kingdoms in revolt against the Alafin's supremacy tended to render as sterile and unprofitable the application and suitability of the imperial theory in understanding the nature of Yoruba political life. Besides, it appears very strong a view that the central thesis of the imperial theory is only assumptive not factual; for no fact of Yoruba political life is captured in the assumption of the theory. In less controversial terms, the failure and fallout of the imperial theory necessitated the evolution of the second theory which is the Roman-Empire theory.

3.6.1.2 THE ROMAN - EMPIRE THEORY

The Roman-Empire theory is popularly associated with the analysis of P. A. Talbot. According to Talbot, Yoruba political life is strikingly structured around the Holy Roman Empire which had both a political head and a spiritual head both independent of each other. In this regard, it is often said by those who accept Talbot's interpretation of Yoruba political life that the Alafin of Oyo constitutes the political head of Yoruba land while the Ooni is referred to as the spiritual head. According to Akinjogbin, this was the origin of the Ooni being constantly referred to as the spiritual head of the Yoruba.[109]

As identified by Akinjogbin, there are glaring defects with this conception of Yoruba political life and the basis of political authority exercised therein. In the first place, this theory establishes a kind of dichotomy in the understanding of the nature of political authority in Yoruba land. This dichotomy is between the spiritual and the

political. In Yoruba land, it is often peddled that there is an inseparable connection between the religious and the political even though sufficient proofs have not been provided to justify this claim. What is often suggested as a proof, in our thinking, is the view that the universe is involved in a kind of ontological continuum in which all aspects of life are interwoven and intestinal. There is a significant way, however, in which the claim of separation between the 'religious' and the 'political' is true. For example, it is believed in Yoruba philosophy that both the spiritual and secular spheres of existence are separate. However, what is often denied is the view that both politics and religion are independent of each other at the highest level of authority

In the second place, the Roman Empire theory is defective, according to Akinjogbin, in explaining the so-called spiritual functions of the Ooni. In Akinjogbin's words, "if we are to accept strictly the Roman Empire theory, then we would expect to see the purely religious duties which the Ooni performs all over Yoruba land such as presiding over some national festival in or outside Ife. So far, there is no evidence that the Ooni does any such duties."[110]

Moreover, one other criticism of this theory by Akinjogbin is the view that to accept Talbot's interpretation of Yoruba political history is to be guilty of the application of European standards in the interpretation of Yoruba life. In other words, according to Akinjogbin, to accept this model is to celebrate a defect not a virtue in as much as the heart of European historiography is the demonstration and discovery of how the different African societies tend to fall short of European norms.[111] The theory was not interested in understanding the internal dynamics of African traditional life. Even if we can vouchsafe that such a tendency was not Talbot's intention, it may still be said that Talbot's explanatory model of Yoruba political life and history is not

[109] Akinjogbin, A. I. *op. cit.*, p. 6.
[110] Ibid., p. 7.

necessarily intellectually wrong. There may be every reason to believe that the Yoruba people possess a kind of dynamic culture which renders it improbable that their political constitution was structured around the Roman ideal; even then, it is probable that to interpret Yoruba political life in Eurocentric terms is not the import of Talbot's classification. It is not impossible that Akinjogbin got Talbot's analogy wrong. Talbot's Roman Empire theory may be a label by analogy in using the more familiar to define the less familiar. Thus, the charge that the theory is Eurocentric in nature because it assumes that the standards for interpreting Yoruba political life are the European standard needs to be revised.

3.6.1.3 THE ORIGINAL ANCESTOR THEORY

The original ancestor model was coined by Teslim Elias. According to this theory, the basis of Yoruba political life and philosophy is encapsulated in the place and role of ancestors in the political institutions in operation in Yoruba society. Thus, in a sense, this theory or explanation about Yoruba political life can be branded the source theory. If conceived in this manner, what it shows or depicts is the fact that the acceptance of the role and place of the ancestral link in Yoruba political life is connected with the activities of the ancestors.

The ancestral factor in Yoruba political life is often distinguished from the divinities. The ancestors are regarded as one-time family or community members who have departed this world through death. But then the concept of death in Yoruba philosophy, taken from the ancestral dimension, needs a qualifier. Death is an indication of transformation of the personality of the dead into that of ancestral spirits. The interests of the ancestors in the activities and events that go on in the community where they belong to is explainable in the light of the fact that they had been once members of that community.

---

[111] Akinjogbin, p. 2.

The original ancestor theory, as contended by Elias, is a legalistic interpretation of Yoruba concepts of legitimacy and authority especially in relation to the idea of monarchy in relation to each of the kingdoms in existence at that time. Since what is crucial to us is the explanation of the basis of Yoruba political life, what is tapped into in the original ancestor theory is the acceptance of the social continuum that exists in the given society.

The beauty of the theory is that it may be found to transcend the inherent Eurocentric projection laden in the theories of Imperialism and Roman-Empire, if indeed that charge is true. It tends to accord with the metaphysical reality prevalent in Yoruba philosophy. African traditional life sometimes are hard to understand outside the framework of the supra sensible powers. The ancestor theory tends to validate this trend. But then the acceptability of the theory will have to be argued for and the grounds for accepting the theory may not necessarily consist in the fact that it is home-grown. That a theory is home-grown is not necessarily an intellectually good reason for choosing it.

However, one obvious difficulty of this theory is that it is not, as a matter of fact, discussed in intellectual exchanges on the history of the Yoruba, especially at the political and philosophical levels. Its philosophical significance is somewhat marginal and that marginality is confined to the legalistic circles. Besides, the ancestor theory is lacking in thorough going empirical validation and verification. Not many authors in Yoruba studies refer or cite the ancestor theory as a valid conceptualisation of Yoruba political philosophy. In other words, the references to the ancestor theory in Yoruba philosophical works are slim.

Again, in a very fundamental respect, the ancestor theory ended up compounding what was in need of some explaining. For example, what is the index for

determining the nature of ancestor hood? How can we rationally establish the notion of ancestorhood? Truly, there are traces of belief in ancestors in Yoruba land but how this belief explains the political life and philosophy of the people needs to be substantiated. A valid question to ask at this point is how rationally true is the view that political life is explainable in terms of the role of the ancestors? In other words, how empirically verifiable, either in principle or in practice, is the linkage between the living and the dead? One of the reasons behind the unsuccessful nature of the ancestor theory is not only in the fact that it was unpopular as a systematic philosophical account of Yoruba life but also in the fact that a radically and empirically viable and sociologically verifiable theory, the ebi concept, took its place.

3.6.1.4 THE EBI CONCEPT OR THEORY

In the basic sense, the *ebi* concept or theory was coined by Akinjogbin.[112] Unlike the imperial and Roman-Empire theories that can be regarded as the use of foreign ideas in the interpretation of African realities, the *ebi* concept was an adaptation to the realities of the African condition in explaining the basic nuggets of its political philosophy. In the words of Olaniyan and Adebayo, "Akinjogbin would prefer that an African phenomenon be explained within the context of African historical and cultural experiences, not on any theoretical formulation, especially when the theory has a foreign origin."[113] However, that is Akinjogbin's preference, not a principle of explanation on some theoretical formulation.

We can thus infer that the *ebi* concept, as used by Akinjogbin, is an explanation of the nature of Yoruba political philosophy or the basis of political authority in naturalistic terms not militaristic terms. As a naturalistic explanation of

[112] Akinjogbin, A. I. *Dahomey and its Neighbours, 1708-1818*, Cambridge: Cambridge University Press, 1967, pp. 14-19.

political life, the *ebi* concept introduces into Yoruba historiography the salience of the genealogical or ancestral blood linkage in the explanation of social and political life. In his words, Akinjogbin writes that:

> *The Yoruba explained permanent political relationships in natural and not military terms, that what bound the society together was blood relationship, not military superiority, economic interests or security needs, and that citizenship was therefore defined in terms of birth, not nationalisation.*[114]

The *ebi* theory, no doubt, is sound on its own right since it is an excellent capture of some of the basic ingredients, such as brotherliness, solidarity, consanguinity, that make Yoruba life quite challenging and worthy of study. However, the *ebi* concept can equally apply to other cultures. But, our contention is that this theory is basically a sociological one but not a political concept nor a jurisprudential theory. But then, even at that, this is not a defect at all. This is because many concepts have multidisciplinary origins. The multidisciplinary nature of a concept can assist us in ferreting some jurisprudential and political ideas, such as the ideas of justice, law and morality, inherent in the concept concerned.

It is true that evidence of blood tie and natural bonds exist amongst the Yoruba people especially in understanding the relationship between the monarchs in the different kingdoms. It also explains why the various Yoruba states have enjoyed close affinity and alignment. Indeed, the theory captures well why Yoruba kingdoms have enjoyed a kind of continuity till date.

What the theory is yet to do and which we are set to analyse is how it accounts for the nature of rules that govern the political formations that are existent within that political enclave and why it is that Yoruba people, if they do accept those rules, accept them in the first instance. Since Akinjogbin's preference for the *ebi* concept

---

[113] Olaniyan, R. A. and Adebayo, A. G. "Yoruba Inter Group Relations and Diplomacy" in *Culture and Society in Yorubaland*, edited by D. Ogunremi and A. Adediran, Ibadan: Rex Charles Publication, 1998, pp. 97-112, at p. 98.

[114] Akinjogbin, A. I."Ebi Concept Reconsidered.", p. 8.

was not tailored towards a jurisprudential purpose, alluding to it means one must be prepared to discover the possibilities it holds for a jurisprudential analysis of Yoruba people.

What we are set to consider within the understanding of the *ebi* concept is how the *ebi* theory accounts for what makes up the nature of the rules in Yoruba land i.e. their internal workings or to use the language of Hart, what makes up the internal aspects of the rules in Yoruba land and which have come to form the substance of what may be called a comprehensive Yoruba jurisprudence. What is in need of serious attention is the normative basis of Yoruba political order and system.

In fact, the affinity and unity presuppositions laden into the claims of the *ebi* theory could not also be faulted by the empirical fact that there were incessant wars and disunity between the monarchs in the various Yoruba kingdoms since, even in a family, there tends to be acrimony and disunity and that does not remove the fact of blood affinity or characteristics. In a sense, this is where the original ancestor theory tends to transcend the *ebi* theory in the sense that it was concerned with the source of rules that govern the Yoruba kingdoms. The problem with the ancestor theory is in its appeal to ancestral theory which, upon further inquiry, can be reduced to the status of irrelevancies. The *ebi* concept is interestingly one aspect of the Yoruba state system. What is in need of explanation is the jurisprudential framework it shoulders.

The *ebi* theory was designed to establish an African basis for the explanation of African phenomenon. More possibilities need to be furthered. That African political systems cannot be analysed in European political moulds is normally considered an acceptable proposition but it stands questionable since it is not necessarily true except upon racial parochialism. The *ebi* theory truly encapsulates the basis of Yoruba nationalism. Moreover, it accounts for the obligation of citizenship to the rules that

have come to be operative in that society. The basis of political authority or legitimacy in Yoruba land is explainable in the light of the fact that there are kinship ties among the various kingdoms in Yoruba land. The theory can be regarded as an explanatory device for the nature of inter-state and intra-state or group relationship between Yoruba people in general.

If we are to understand the *ebi* in its relevant import, then it is the case that its central assumption and features ought to be clearly stated such that if the work of critical appraisal is to achieve its merit, then there would be a basis for it. Akinjogbin has reasoned that what stands in need of attention on the *ebi* theory is to understand how it is the case that the essence of the theory stems from the peculiarity of the theory to itself. The correctness of the theory can thus be judged from that perspective. What then are these characteristics which make the concept peculiar to itself?

In the first instance, the peculiarity of the concept consists in the fact that the feeling of belonging which prevails as a general character of Yoruba political arrangement or organisation was not imposed by any force of arms, but by a common acceptance of having been related by blood. What are some of the things one can deduce from these characteristics? One, it defines citizenship in blood related terms. Thus, it emphasises a kind of ancestral linkage. The call for secession to form the Oduduwa Republic at the wake of the June 12, 1993 crisis is a credible instantiation of this blood definition of citizenship. This could explain why there is no kind of belongingness between occupiers of the present day modern Nigeria in as much as each tribe or ethnic group tends to define their identity in the whole programme of Nigerian citizenship in very inclusive and exclusive terms. A classic example of this

disappointing nature of Nigerian citizenship is contained in the following comments by Jagun. According to Jagun,

> *I am asked to love Nigeria, to want Nigeria, to perforce remain Nigerian. What would be my gain if I so remain, I could not fathom. For if I so do, I shall forever lose the surest thing I could hold unto, my heritage, the one my community gave me. And yet I shall get nothing in return from Nigeria. Nothing except shattered hopes, battered dreams. Nothing except a citizenship derided, defied and defiled... Is this Nigeria to me?*[115]

Even Nigerian constitutional framework which defines citizenship in blood related terms has been a very disappointing example of blood definition of citizenship. It is a very curious example of blood definition of citizenship in the sense that all the occupiers of present day Nigeria are not and never were bonded together in terms of blood connection. That is why the examples of the civil war and the June 12 crisis have been demonstrative examples of the perplexity of the Nigerian condition in terms of citizenship sentiments. As argued elsewhere,

> *The character of the crisis and conflict that attended the annulment and the whole socio-political atmosphere that prevailed had the tendency of altering the content and context of Nigerian politics permanently. The present call for secession by the Yoruba ethnic group from the Nigerian federation to form the Oduduwa Republic coupled with the on-going debate and counter debate for shift of power to the south is an important evidence of the presence and pressure of citizenship claims in Nigeria.*[116]

But then that is not all there is to Akinjogbin's analysis. Even by this alone, nothing uniquely original or fantastic is added to Yoruba political system. In fact, it is sometimes better if the definition of citizenship transcends blood definition. It is in our awareness that the definition of citizenship in the United States of America, for instance, is not blood defined in the sense in which it is defined in Nigeria. To claim citizenship in Nigerian constitutional terms, either of your parents must have been a son of the soil in one sense or the other. In other words, ability and the conviction to

---

[115] Jagun, "What is Nigeria to me?" *The Guardian*, Lagos, January 24th 1994.
[116] Idowu, W. O. O. "Citizenship Status, Statehood Problems and Political Conflict: The Case of Nigeria" in *Nordic Journal of African Studies* 8(2), 1999, pp. 73-88, at pp. 84-85.

trace one's root to someone living or dead must be counted a patent possibility, if not in solid details of existential actualities. Thus, the emphasis is on natural conditions and factors. This is note worthily stated in the observations of Femi Taiwo when he wrote that: "part of what typifies citizenship, especially in the modern state, is the de-emphasizing of geography and other natural facts in its composition."[117]

And more importantly, the force of arms is sometimes very important in sharing a sense of belonging. The pains of war sometimes have been found to be of immense historical and cultural consequence and significance. The probable rationality in this claim has the capacity of reducing to absurdity Akinjogbin's contention that force of arms was unnecessary. The American federation cannot be defined in terms of blood relationship or connection. The force of arms is relevant in defining and understanding the American federation. This has to do with the bloody civil war which engulfed the country and which was fought but eventually brought the people together. Today, however, it is one of the several countries, excluding Nigeria of course, where quick and wonderful redress on citizenship can be guaranteed.

Again, the peculiarity of the *ebi* concept in Yoruba political arrangement and societal organization emphasises precedence among the princes only in terms of natural order of birth, and not on their circumstances after birth. In the words of Akinjogbin, "irrespective of acquired wealth and military power, the older claimed privileges before the younger, and the privileges of the individual princes were inherited by their subjects."[118] At the face value, this characteristic or dimension of the *ebi* concept is antithetical to what we may call meritocracy i.e. a kind of political organization and administrative system built around the ideals of merit.

[117] Femi Taiwo, "Of Citizens and Citizenship", *The Tempo*, Lagos, Sep.-Oct. 1996, p. 16.
[118] Akinjogbin, A. I."Ebi Concept Reconsidered.", p. 16.

Trenchantly, the *ebi* concept is quite illuminating in respect to gender consideration. It stands at the heart of the current challenge from African cultural epistemologies on the need to de-conceptualise the Eurocentric basis of feminist theory. As emphasised in a previous study, "the African cultural epistemologies on gender", as seen in the light of the *ebi* concept, "stems from the need to de-mystify the perceived European cultural category or epistemologies as the universal standards in gender constructs. Since gender roles vary between cultures and different societies, then a projection of western paradigm as the universal experiences of women will sound practically unreasonable."[119]

If this second characteristic of the *ebi* concept is true and acceptable, then there seems to be a kind of correlation in the views of Oyeronke Oyewumi on the seniority issue as the decisive factor in African family system. This is unlike the western model, argues Oyewumi, that is based on the gendered nuclear family model which is based on the father-mother-children model. In the African family system like the Yoruba family system, power centres within family are diffused and are not gender-specific. Rather they are based on seniority.[120]

The third characteristic and which is very instructive, is the view that as part of the *ebi* concept, it is the filial duty of everyone to protect their father and by extension, his territory. In the words of Akinjogbin,

> *The picture that emerges is one in which dependence, independence, master and servant are all unhelpful concepts. Interdependence within a family, in which everyone has well defined roles, responsibilities and privileges, is nearer the picture. The standard of judgement is whether each person has been discharging his roles properly within laid down family norms, not whether he possess the physical powers to compel obedience.*[121]

---

[119] Idowu William, "Nigerian Citizenship, Gender and the Politics of Identity: The Conflict between Constitutionalism and Conventionalism" in *Brainfield Law Journal*, Vol. 1, No 2, 2004, p. 134.
[120] Oyeronke, O. "Conceptualising Gender: The Eurocentric Foundations of Feminist Concepts and the Challenge of African Epistemologies" *Jenda: A Journal of Culture and African Women Studies*, http://www.jendajournal.com/jenda/vol. 2.1/toc2/1/htm>:2,1
[121] Akinjogbin, [121] Akinjogbin, A. I."Ebi Concept Reconsidered.", p. 16.

3.6.1.5 THE *IWA* THEORY

An alternative theory to the *ebi* theory is the *iwa* theory. Both theories tend to have captured excellently the substance of Yoruba political life and aspirations and by implication and extension, its jurisprudence. In its conceptually perceived form, basic to the jurisprudential and political life of Yoruba people is the kind of moral foundation on which every aspiration about political, social and economic life is built or based. The moral foundation of Yoruba political and jurisprudential thought is the ideal or concept of *iwa.*

As a matter of fact, the most important pursuit and standard way of life consist in the concept of *Iwa*. Among the Yoruba, *Iwa* ordinarily means character, but in a deeper sense, without the qualifier, good *Iwa*, an average Yoruba man or woman has the understanding of the concept of *Iwa*. As the most important pursuit, embedded in the concept of *Iwa* is the idea of a good moral standing in the society. This is reflected not only in interpersonal relations but also in public and communal life. The concept of *Iwa* is a standard or aspiration in-built into the framework of societal institutions.

In other words, *Iwa* must be reflected in the laws of the society, the collective aspirations of the societal norms and regulations and in the general perception of people towards the collective or common will. It appears very strong a view that in Yoruba land, the basic standard for which every attempt at and enterprise of communal and collective life is to be evaluated and judged consist in the approximation and reflection of the concept of *Iwa*. This is true in marriage, dressing, in communal service, kingship matters and legislation, religious worship and family affairs. The necessity of the concept of *Iwa* in these various strands of communal life

explains a lot about the incessant warfare between the council of chiefs and elders and the *Alaafin*, the Oba in the then old Oyo Empire.[122]

The main goal of Yoruba institutions especially political, social and legal ones, as seen in the aspiration towards the promotion of law and order in the community, is reflected in the existence of a moral order which serves to regulate the direction of human thoughts, actions and pursuit. In the words of Opeloye,

> *In Yoruba theology, certain norms and codes of conduct are entrenched which facilitate orderly maintenance of the society. These form the moral values. Every man is endowed with the sense of right and wrong, he knows what is morally right and what is morally wrong. Those things which are morally disapproved by the society are known as eewo (taboos), the prohibited action. These are not contained in any revealed law, rather they are preserved in the tradition.*[123]

The awareness is created that sin, that is, an offence against the norms of the society, is punishable. There are sanctions against offenders. Acts of sacrifice and rites of purification only remedy serious crimes against the norms of the gods. Therefore, in order to maintain harmony with oneself, the community and the environment of which one is actively engaged in interaction, one is expected to adhere strictly to the norms, rules and customs of the land, as enunciated by the elders, who are seen as the custodians of the cultural tenets of the people. This belief is premised on the ideal understanding that when one member sins against the dictates of communal bonded ness, the consequences do not stop with him alone but also to the family and the immediate community.

---

[122] According to Bolanle Awe, in the eighteenth century this kingdom was the scene of a series of conflict in which power alternated between the Alaafin and his chiefs. The issues that sparked these conflicts have been differently interpreted by different historians...whatever the issues were, they certainly represented the factors that engaged the attention of the ruler and his chiefs. Bolanle Awe " The Iyalode in the Traditional Yoruba Political System" in *Sexual Stratification A Cross Cultural View*, Alice Schlegel (ed.), Columbia: Columbia University Press, 1977, p. 149. Daramola and Jeje, above, have provided one of the reasons: according to them, the conflict stems from the fact that the actions of the monarch are irreconcilable with the standard norms and expectations of the people. See Daramola and Jeje, op. cit., p. 160.

[123] Opeloye, M. O. "Evolution of Religious Culture among the Yoruba" in *Culture and Society in Yorubaland*, edited by D. Ogunremi and A. Adediran, Ibadan: Rex Charles Publication, 1998, pp. 139-148, at p. 140.

Interestingly, the key to understanding the essence of political relationship is impressively and noticeably contained in the inspiring concept of *Iwa*. This concept is a classic index of what good social relations can be. That is why the concept is a binding concept on the members of a given clan, settlement or household. According to Adewoye, "good character also makes for good social relations, and hence it is laid upon every member of the community to act in a way as to promote always the good of the whole body."[124]

The concept of *iwa* as elucidated above seems to elicit some sort of controversies among European scholars and African philosophers on the nature of African culture in general and Yoruba philosophy in particular. This is what Segun Oladipo calls the exaggeration of the role of religion in African culture and political philosophy.[125] This exaggeration, though traceable, is nevertheless rendered in very controversial senses. One dimension of the controversies centres on the view that Africans lacked those religious and moral beliefs and attitudes and perhaps experiences that define a genuine human civilisation. In the words of Samuel Baker,

> *Without exception, they are without a belief in a Supreme Being, neither have they any form of worship or idolatry; nor is the darkness of their minds enlightened even by a ray of superstition. The mind is as stagnant as the morass which forms its puny world.*[126]

Another dimension of the controversy borders on the relation between *iwa* on one hand and the relationship between religion and morality on the other hand. The relevant question then is: is the concept of *iwa* a product of religion or that of morality? Again, founded on this preceding question is the following: is morality in African culture essentially a product of religion? This question could be put in another

---

[124]Adewoye, O. "Proverbs as Vehicle of Juristic Thought Among the Yoruba" in *Obafemi Awolowo University Law Journal*, January and July 1987, Vols 3 & 4, pp. 1-17, at p. 2.
[125] Oladipo, O. "Religion in African Culture: Some Conceptual Issues" in Kwasi Wiredu, (Ed.) *A Companion to African Philosophy*, Malden Massachusetts: Blackwell Publishing Limited, 2004, pp. 355-363, at p. 360.
[126] Baker, S. in an address to the Anthropological Society of London in 1866, quoted in Oladipo Olusegun, *op. cit.*, p. 355.

way, is morality independent of religion in African culture or are they inseparable? The answers provided and supplied in response to these questions have a determining proposition through which the secularity of Yoruba political philosophy will ultimately be defined and distinguished.

It is noteworthy that, in Yoruba culture, morality is basically tied to the existence, in the individual self, of the concept of *iwa*. The moral life of the society is judged by the incorporation of the ideals of character or *iwa* in the citizenry. To this end, the moral philosophy of the Yoruba people is entirely tailored towards a kind of idealism. According to Bolaji Idowu, "*iwa* [character], according to the Yoruba, is the very stuff, which makes life a joy...it is therefore stressed that good character must be the dominant feature of a person's life. In fact, it is one thing, which distinguishes a person from a brute".[127] In the same vein, Kwame Gyekye noted that among the Akan in Ghana that "the concept of character, *Suban*, is so crucial and is given such central place in Akan moral language that it may be considered as summing up the whole of morality".[128]

Olusegun Oladipo has argued that morality is separable from religion in African culture. But before we take Oladipo's arguments, it is incumbent that the arguments of those scholars who think that morality is sourced in religion be developed and seen in the light of Oladipo's position. For scholars such as Opoku and Idowu Bolaji, morality and religion are inseparable. In other words, the conclusion of these authors is the view that religion provides the basis for an acceptance of moral values in African culture in the sense that religion is the bedrock of moral norms and values. In Akan culture, according to Kofi Opoku ...morality originates from religious considerations, and so pervasive is religion in African culture that ethics and religion cannot be

[127] Idowu, B. *Olodumare: God in Yoruba Belief*, New York: Longman, 1963, p. 154.

separated from each other...Thus, morality flows out of religion".[129] In a similar light, Bolaji Idowu commented on the nature of Yoruba religion and morality thus:

> *With the Yoruba, morality is certainly as fruit of religion. They do not make any attempt to separate the two, and it is impossible for them to do so without disastrous consequences. What have been named taboo took their origin from the fact that people discerned that there were things which were usually approved or disapproved by the Deity.*[130]

It is not impossible to read in the reasoning of these scholars the view that the concept of iwa is basically a religious concept. This argument can be given a broader treatment as sketched out below. That the concept of Iwa is a predominant feature of Yoruba ethics, religion and jurisprudence creates no doubt. What is worrisome for scholars like Oladipo is whether such a concept emanates strictly from a religious epistemology. But apart from this, we may have to take it as given that there is close connection between religions and ethics such that what is required by their ethics is also a requirement of religion.

In fact, there is only a very thin line of demarcation, if there is any at all, between Yoruba conception of what is ethical and what is religious or what is secular and what is sacred. This is because, in the first instance, there is no demarcation or separation between them. That is why, for example, in Yoruba ethics, the injunction not to steal, kill, or commit lewdness are representations of religious decrees or injunctions. The Yoruba cosmogony subscribes to the view that underlying every understanding of ethics are the spiritual forces and agents that pervade it.

In what William Bascom[131] refers to as the Yoruba "unwritten scriptures" the Odu Ifa i.e. living statements from Ifa Oracle places an awe inspiring attachment and importance on the concept of Iwa. That is why Abimbola, for instance, claims that the

---

[128] Gyekye, K. *An Essay on African Philosophical Thought: The Akan Conceptual Scheme*, Cambridge: Cambridge University Press, 1987, p. 147.
[129] Opoku, K. A. *West African Traditional Religion*, Accra: FEP International Private Limited, 1978, p. 2.
[130] Idowu, B. *Olodumare: God in Yoruba Belief*, New York: Longman, 1963, p. 146.
[131] Bascom, W. *The Yoruba of Southwestern Nigeria*. New York: Longman, 1969.

gods are always very angry with man whenever he neglects in his duty either to his fellow man or to the gods[132] Odu Ifa is the symbol of the presence of the gods. In particular, the Ifa oracle is the epistemological tool connecting man and the spiritual world under which he is governed. Again, Abimbola claims that the *Ifa* is the epistemic tool of the Yoruba. In his words:

> *Without Ifa, the importance of the other Yoruba gods would diminish. If a man is being punished by the other gods, he can only know this by consulting Ifa...So that in this way, Ifa is the only active mouthpiece of Yoruba traditional religion taken as a whole...he is the mouthpiece and the public relation officer of all other Yoruba gods.*[133]

Trenchantly, the analysis so far underscore the importance of the concept of *Iwa* not just in the moral and religious aspiration of the Yoruba people but also in the place accorded it in the Yoruba idea and concept of destiny. There is a symbolic symbiotic relationship of staggering worth between the concept of destiny and the concept of *Iwa* in Yoruba cosmogony and popular ideas about the origin of natural and social phenomena. The idea is that, according to Yoruba people, *Iwa* has a positive role to play in the understanding, framing and execution of man's destiny while here on earth.

However, according to Oladipo, for instance, the arguments often adduced for maintaining the closeness between ethics and religion in African culture are utterly unpersuasive. In the first instance, according to Oladipo, the view that religion is all pervasive in African culture needs to be reworked and revised because it will be found out that such a supposition or claim is not so in actual fact. For him, the tendency to over react against western culture that sees nothing good in African culture accounts for the reason why religion is said to be an all pervasive thing in Africa.

---

[132] Abimbola, W. *IFÁ An Exposition of Ifa Literary Corpus.* Ibadan: Oxford University Press, 1976, p. 151.
[133] Abimbola, W. "The Place of Ifa in Yoruba Traditional Religion" *African Notes* Vol. 2, Jan., 1965, pp. 3-4.

Sounding like a neutralist, Oladipo's claim is that we cannot take an extreme view to answer or counter another extreme view. In his words, "the claim that Africans are religious in all things is a dominant aspect of a counter-discourse which tried to show that Africans were not irreligious and immoral as some Europeans were wont to suppose".[134] Our observation about Oladipo's remark here is two-fold: one, he tends to underestimate, not undermine, the nature of religious feelings and experiences which appears pertinently intertwined with the history of the Yoruba people, for instance. Some of the theories previously alluded to in explaining Yoruba political philosophy or life, one way or the other, project a kind of positive attitudes towards religion on the part of the Yoruba people. Given this, it cannot be concluded that the all-pervasive nature of religion in Yoruba land is to take an extreme view of African culture.

The second remark is that Oladipo's charge against the all-pervasiveness of religion in African culture is doused by the fact that, in traditional African culture, beliefs-attitudes such as atheism or agnosticism, even if they exists, are less pronounced in most African societies, including Yoruba land.[135] Against the charge that God to the Africans is a *Deus incertus* and *Deus remotus*, Opeloye contended that

> *The strongest proof of African belief in God's existence is the fact that every ethnic group has names for the Supreme Deity in contradistinction to the divinities. In Yoruba land, the name for the Supreme Deity is Olodumare or Olorun. What this implies is that God to the Yoruba is not merely an abstract concept, a vague entity but a veritable reality."*[136]

[134] Oladipo, O. *op. cit.*, p. 358.
[135] See Hallgren, *op. cit.*, p. 23.
[136] Opeloye, M. O. "Evolution of Religious Culture among the Yoruba" in *Culture and Society in Yorubaland*, edited by D. Ogunremi and A. Adediran, Ibadan: Rex Charles Publication, 1998, pp. 139-148, at p. 139.

Perhaps a third remark can be made: Oladipo's conclusion that the claim of all-pervasiveness of religion in African culture is mistaken is made sterile if we come to the recognition that aspects of Yoruba culture in the Diaspora, including and especially religion, are still as intact as they were learnt here.[137] According to Charles Alade, writing on some aspects of Yoruba culture in the Americas, "each ethnic group in the Diaspora has its own special cultural focal point, around which people's interests crystallises. As in the case of the Yoruba, it is religion. Of all the African religions that have survived in the Americas, it is undoubtedly that of the Yoruba which has remained most faithful to its ancestral traditions."[138]

In the second instance, Oladipo's view is that most indigenous religions in African culture are non-revealed religions without founders, no sacred texts or scriptures containing its divine truths or body of teachings as in Christianity and Islam. The divinities in question are sometimes open to moral assessment of their devotees which means that morality is not a question of a religious persuasion or conviction but one established on the moral instinct, perception and knowledge of the devotees concerned.

Again, something seems to be wrong here. The nature and mode of revelation in general terms are not and never the same. The mode of revelation that lends credence to the claims of Christianity is different from that which tends to legitimate claims of Islam. If we then search very carefully, it will be seen that the nature of revelation consistent with Christianity is not a pattern for what obtains in Islam such that our conceptual parameters and apparatuses for establishing the nature of religious revelation or what is meant by non-revealed religions will have to be examined again. The absence of written texts constituted one of the reasons why

[137] See Alade, C. A. "Aspects of Yoruba Culture in the Diaspora" in *Culture and Society in Yorubaland*, edited by D. Ogunremi and A. Adediran, Ibadan: Rex Charles Publication, 1998, pp. 203-211.

European scholars denied the existence of African philosophy but could not be conclusive since the absence of written philosophy is not tantamount to the absence of philosophy. Writing was not even a critical feature of the early stages of civilisation. As noted in the celebrated works of Will Durant, the privilege of writing in the early times of civilisation was met with opposition. According to Durant,

> *Simple tribes living for the most part in comparative isolation, and knowing the happiness of having no history, felt little need for writing. Their memories were all the stronger for having no written aids; they learned and retained, and passed onto their children by recitation, whatever seemed necessary in the way of historical record and cultural transmission. ...Doubtless the invention of writing was met with a long and holy opposition, as something calculated to undermine morals and the race. An Egyptian legend relates that when the god Thoth revealed his discovery of the art of writing to King Thamos, the good King denounced it as an enemy of civilisation. "Children and young people," protested the monarch, "who had hitherto been forced to apply themselves diligently to learn and retain whatever was taught them, would cease to apply themselves, and would neglect to exercise their memories.* [139]

3.6.2 THE NATURE OF AFRICAN JURISPRUDENCE

Based on our arguments on these different theories explaining and expounding the political system and organisation in Yoruba political philosophy, we submit that Yoruba jurisprudence subscribes to a conception of law that is reconciliatory and restorative in approach. It is equally contended that these features are also represented in the jurisprudence of many other African cultures and societies apart from the Yoruba culture. The basic and several features of the nature of this jurisprudence can be said to manifest the following qualities and characterisation reflective in erstwhile and contemporary thinking on Yoruba culture and political philosophy. Analyses of these features of Yoruba jurisprudence shall be extended to other African cultures with similar jurisprudential orientation in order to corroborate

[138] Ibid., p. 206.
[139] Durant, W., p. 76.

the argument that there exists an African jurisprudence. What then are the features of an African (Yoruba) jurisprudence?

3.6.2.1 THE CONTENTION THAT LAW IS AN INSTRUMENT OF CONCILIATION, RESTORATION AND RECONCILIATION

The first point to note about the nature and element of Yoruba philosophy of law is the view that law is held to be a reconciliatory instrument for the enhancement and /or restoration of social cohesion and equilibrium.[140] A little reflection is needed to understand the import of this thesis. This statement, if it has a meaning at all, could be this: in the first instance, that law is first and foremost a social commodity i.e. a societal property. If this be the case with African jurisprudence, this is, openly, not unique to African experience. As it is everywhere in the world, law is and has always been a social property. In other words, it is a mark of law to regulate and enter into social relationships. To this end, it is not only an instrument of social interaction but also social transformation. But then, this could not be the main emphatic thesis about African jurisprudence. Since this quality about law is shared by all cultures, it follows that other distinctive marks of law will have to be identified which separate or distinguish this jurisprudence from, say, western jurisprudence or Chinese jurisprudence.

In the second instance, one can infer that law is not only a social commodity or property but that very significant to the idea of law is the protection and safeguard of social existence. In other words, it follows that law is not an end in itself but a means to an end. This much is latent in this Africanist definition or conception of law. If we accept the view that law is a reconciliatory instrument for the enhancement of social

[140] J. M. Elegido, *Jurisprudence*, Ibadan: Spectrum Books Limited, 1994, p. 125. See also Kokoie, O. "Ethnic Conflicts Versus Development in Africa: Causes and Remedies" In *Between Development and Destruction- an Enquiry into the Causes of Conflict in Post Colonial States* Luc Van De Goor, Kumar Rupesinghe and Paul Sciarone, pp: 126-40, The Netherlands Ministry of Foreign Affairs and Netherlands Institute of International Relations, 1996.

cohesion, it then follows that what law is used to achieve becomes of extreme importance than the very instrument itself. It is in this sense that many defining criteria have been invoked in not just defining law but also in establishing the purpose and functions of law in human societies. Given this also, it appears very clear that this understanding of law cuts across all civilizations and epochs.

The problem one may have with this interpretation stems from how to decipher what the end of law is and, perhaps, in the significant sense, who defines and sets the end of law? This problem cannot be shelved aside no matter how elementary its language may be cast. This is because defining or determining the purpose or end of law is one of the critical problems of mainstream jurisprudence which is that of who sets the agenda of what justice is or what a 'good' or 'bad' law is. The problematic of the definition of the end of law is one reason why positivists, for instance, tend to reiterate the need to distinguish and, of course, hold as separable the concepts of law from those of morality. The empirical and metaphysical stuff involved in the rejection and acceptance of these views on the end or purpose of law account for the irreconcilable disquisitions between the positivists and the naturalists over the relation between law and morality.

But then, going by the language of Yoruba jurisprudence, law is not just a social property but an instrument for social cohesion i.e. an instrument for the achievement of certain social ideals. In this case, one can deduce that primarily, law in Yoruba society performs an instrumentalist function. Is the instrumentalist conception of law African? It can be said that the instrumentalist nature of law is not what is significant here since it can be said to be a conception of law in most cultures. What is of importance for Yoruba jurisprudence is not that law performs an instrumentalist function but in what this functional ideal entails. It behoves one to state that Yoruba jurisprudence underscores

the idea of law as a reconciliatory thing. In other words, that "peace-keeping and the maintenance of social equilibrium"[141] stands at the heart of Yoruba jurisprudence. It is in this sense that law is perceived as an instrument of conciliation, compromise and reconciliation.

But then, how does this confer a sense of distinction for Yoruba law since we cannot rule out conciliation and reconciliation in other cultures? For proper understanding, there is the need for a qualifier here. In the west, for instance, French jurisprudence manifests a purely inquisitorial character founded on the idea of civil law. Civil law in this context derives primarily from statutes and existing philosophical doctrines. In this kind of jurisprudence, the accused is presumed guilty until the inquisitional procedure proves him innocent. In a somewhat similar though different sense, British jurisprudence is a notoriously accusatorial and adversarial system. The adversarial system is founded on common law rather than civil law. In common law, legal ideas are derived from decisions of earlier courts. Statutes only play a secondary role. In all, an accused in this system is assumed innocent until proved guilty.[142]

The point is that in these systems, the substance of jurisprudence is the essentially adversarial or winner-takes-all perspective.[143]The inquisitorial and accusatorial nature of law and judicial activity is remote in Yoruba jurisprudence and even its evidence in much of African legal and judicial processes in contemporary times is a British imposition. In actual fact, as argued by Elias, parties to a suit left Yoruba courts neither puffed up nor cast down - for each a crumb of right, for neither of them

[141] Adewoye, O. *The Judicial System in Southern Nigeria, 1854-1954*, London: Longman, 1977, p. 3.
[142] Asiwaju A. I. "Law in African Borderlands: The Lived Experience of the Yoruba Astride the Nigeria-Dahomey Border" in Kristin Mann and Richard Roberts (ed.) *Law in Colonial Africa*, p. 229.
[143] Asiwaju A. I. "Law in African Borderlands: The Lived Experience of the Yoruba Astride the Nigeria-Dahomey Border" in Kristin Mann and Richard Roberts (ed.) *Law in Colonial Africa*, Portsmouth, NH: Heinemann Educational Books, Inc., 1991, p. 224.

the whole loaf.[144] Elias' saying this, however, is no reason for not seeing and establishing the shortcoming of this view in the face of facts. This is because this assertion is not entirely true in the face of Yoruba monarchical arrangement when a king is involved in a dispute with his subject. This may perhaps concern cases of disputes between citizens of the kingdom other than the king himself. If the theory will have to be thoroughly grounded and accepted, perhaps, it will have to be on the basis of other merits.

Does it then mean that the concept of punishment is alien to African legal philosophy? Are there no punitive aspects in African jurisprudence as it relates to Yoruba jurisprudence, Barotse jurisprudence, Igbo jurisprudence or any other African society? Are we then not romanticising African law if excessive emphasis is on the notion of reconciliation rather than the retributive elements? Since conciliation is said to be the heart of African legal philosophy, it then follows that even the idea of wrong doing is deliberately distorted and not given its true picture or is deemed to be alien to Yoruba or African societies.

In other words, it is to create a picture of African societies that is essentially and entirely mythical. Besides, a society where reconciliation is prevalent is a pre-legal society since reconciliation is a purely moral and an essentially anti-legal stuff. According to Hart, the separation of law from morals, for instance, is an indication of development and progress. Hence, law as reconciliation cannot be ascribed a truly legal character in as much as it stands against some of the essential features of a law which are: the element of a command, the punitive nature of law which is the imposition of sanction for offences committed and a separation between law and morality.[145] These

[144] Elias, T. O. *The Impact of English Law on Nigerian Customary Law*, Lagos: Ministry of Education, 1958, p. 4.

[145] Cf these with John Austin's analysis of the nature of law in John Austin," Law as the Sovereign's Command" in *The Nature of Law* in M.P. Golding (ed.) New York: Random House, Inc., 1966. For Austin, these features are necessary conditions for the existence of a system or theory of law. According to Austin, a law lacking in this details is a contradiction in terms. Laws carry the essence of a command and to that extent are imbued with elements of sanctions, a feature which makes it necessarily separated

items are missing in the idea of law as reconciliation and as such reduce the force of legality that the law-as-reconciliation model should necessarily incorporate or manifests.

It appears very clear that these attributive criticisms against this idea of law as suggested and propounded in Yoruba jurisprudence is misconceived. In the first instance, even in western jurisprudence, the elements of sanctions and commands have been argued to have very little to do with the idea of law. Austin's celebrated notion of law carries much of these elements but then Austin's command theory of law has been the subject of pertinent and heavy criticisms. One is that commands and sanctions are not the primary elements of law. So, if law-as-reconciliation model is held as anti-legal because it fails to incorporate the element of sanctions, it is obvious that this kind of criticism should be revised. The basis of the revision is the view that the two are ideas of law. One cannot use one simply to rule out the other. The critique of any one of them must be based on independent criteria and considerations. We cannot use one definition of law to reject another definition of law.

Again, there are rights-conferring laws which have nothing to do with sanctions or commands and which are nevertheless laws recognized within a given state. Therefore, if Yoruba jurisprudence's insistence is that laws are instruments of reconciliation, conciliation or restorative justice or what have you, it is clear that the boundary of the legal is yet to be exceeded. And for all we may know, it is not true that there are no elements of sanctions or punishments existing in Yoruba jurisprudence. When reconciliation is projected as the basis of law, it does not at all preclude the idea of punishment; it only establishes the ultimate target and aim of law.

---

from morals. Austinian jurisprudence as exemplified in the above have clearly been reduced to absurdity in the whole enterprise of law making and legal construction. See Kelsen's *General Theory of Law and State*, Harvard University Press, 1946, pp. 33-36; see also Hart's "Positivism and the Separation of Law and Morals" 1958, Harvard *Law Review* 71, 593.

In post-apartheid South Africa, with the establishment of the Truth and Reconciliation Committee (TRC) under the Promotion of National Unity and Reconciliation Act of 1995 to deal with the violence and human rights abuses of the apartheid era on a morally accepted basis and to advance the cause of reconciliation, one of the central emphasis and objectives of the Committee was the need to promote social stability which is considered a greater good than the individual right to obtain retributive justice and to pursue perpetrators through the courts. Leading members of the African National Congress (ANC) contended that the "retributive justice" was defined as "un-African."

The committee's chairman was Archbishop Desmond Tutu. In the official discharge of the duty of the TRC, Archbishop Desmond Tutu, in 1996, commented that "God has given us a great gift, *ubuntu*.... *Ubuntu* says I am human only because you are human.... You must do what you can to maintain this great harmony, which is perpetually undermined by resentment, anger, desire for vengeance. That's why African jurisprudence is restorative rather than retributive."[146]

As a matter of fact, in Yoruba jurisprudence, there are cases of punishment especially in cases of wilful murder or arson or even in cases of blasphemy against revered traditions. To reject Yoruba jurisprudence, African jurisprudence and the legality of reconciliation, such as is attempted by John Austin, on the basis of the absence of sanctions, commands and such other stuff is to force certain conclusions on Yoruba (African) jurisprudence which are clearly unnecessary and bound to be stifling of intellectual progress.

A likely and possible objection to the law-as-reconciliation theory, which cannot be overlooked, is the view that reconciliation epitomizes a moral affair and not

[146] Quoted in Wilson, R. "Challenging Restorative Justice" in *Human Rights Dialogue*, Series 2, No. 7, winter 2002.

legal and to that extent conflates morality with legality. A legal system or theory of law which collapses the distinction between the legal and the moral is a system that belongs exclusively to the past and a reflection of the stupor of Africanism. A system of law that separates the moral from the legal is an indication of jurisprudential dynamism.

This likely objection can be considered crucial since it lies at the heart and substance of what picture of law and morality can be ferreted out of Yoruba (African) jurisprudence. But then what could this mean? It possibly could mean that to set an agenda of reconciliation as the basis of law is to set not a legal agenda but an essentially moral agenda or goal. And if a moral goal is not a legal goal, then attempts to marry the two will distort the nature of law. It then follows, one may reason, that the idea of law-as-reconciliation is clearly in need of revision since it is only ascribing law a moral goal. A moral goal is only incidentally important to a legal system or theory of law if it is at all necessary in its construction.

What this objection does not seem to consider is the view that law, as we said earlier, is a social commodity and property meaning that it grows with society. It does not exist in a vacuum nor did it originate from the sky. Laws are products of societal reflections and agreements. To this extent, they are developments from the history, character and features of a particular nation. This is one of the revered principles about law that jurisprudence inherited from German Romanticism. This shall be expounded on later in the work.[147]

Significant therefore, for Yoruba (African) jurisprudence, is the view that law is not an imposition of any sort but one that develops with society itself. In other words,

[147] This is greatly amplified and elaborated in the third contention of African jurisprudence which sees law as a reflection and expression of the life-force, inner self and soul of a shared, communal and public union.

law and society are blended and harmonised with each other such that the history of law is the history of society as well. It is then the cultural and national spirit prevalent within that society that explains well the substance and goal of laws within that society. It is in this sense that reconciliation is taken to be the heart and substance of law in general in African societies. It is in this also that the relation between law and morality in African jurisprudence is held to exhibit a kind of conceptual complementarism since both law and morality in this kind of society are mutually defining considering the character or development of law within that society.

Thus, the reconciliatory nature of law endorses the view that law and morality are not antagonistic to each other since, by virtue of their inherent origin and development, they both existed and developed to further societal interests, which in the case of African jurisprudence, is the enhancement and maintenance of social cohesion and equilibrium. This is not restricted to the Yoruba society which Adewoye, Elias and Asiwaju have pertinently demonstrated knowledge of. The same can be said of the Barotse of Northern Rhodesia. According to Gluckman,

> *When a case came to be argued before the judges, they conceive their task to be not only detecting who was in the wrong and who in the right, but also the readjustment of the generally disturbed social relationships, so that these might be saved and persist. They had to give a judgement on the matter in dispute, but they had also, if possible, to reconcile the parties, while maintaining the general principles of law*[148]

3.6.2.2 THE NATURE OF AFRICAN JURISPRUDENCE CONSISTS IN THE CONTENTION THAT LAWS ARE CODES OF GENERAL PRINCIPLES, NOT OF DETAILS, FOR THE GENERAL GUIDANCE OF SOCIETY

Again, the heart of African jurisprudence can be deciphered in the view that laws are codes of general principles, not of details, for the general guidance of society. [149] This conception is, again, not peculiar to Africa or Yoruba jurisprudence.

---

[148] Gluckman, M. *Judicial Process among the Barotse*, Manchester: Manchester University Press, 1967, p. 28.

[149] J. M. Elegido, *Jurisprudence*, Ibadan: Spectrum Books Limited, 1994, p. 125

However, what may be different from culture to culture may consist in what kind of principles there are in each community or society. The specific quality of this notion of law in Yoruba jurisprudence consists in the fact that laws are described as principles. And as principles, they could refer to certain basic ideas that express the legal character of the community concerned. In another sense, as principles it could mean that laws are moral rules or ideas that gives some form of legitimacy or backing to legal rules which in turn controls or directs the course of action in that community. In other words, it could mean an identified standard by which laws that regulate human actions, in the normative sense, are judged as either acceptable or unacceptable within that society.

Significantly, therefore, if Yoruba (African) jurisprudence is identified with the view that laws are set of general principles, not of details, for the general guidance of society, it means in the actual sense that those principles are not just statements of facts (in actual fact they cannot be statement of facts) but normative statements laying down rules to guide human conducts.

But then, if this is what is meant when Yoruba (African) jurisprudence is spoken of, it is clear that nothing new is conveyed here since in the factual and practical senses, this conception of law is not too different from what obtains in other cultures. For instance, Roman jurisprudence is demonstratively a system of rules based on identified and general principles for the regulation of human behaviour. In the same vein, modern civilisations and systems of laws owe a lot to the Jewish tradition's excellent combination of cultural and divine principles as constitutive elements of law as expressed in the idea of the Will of God. The role of Ancient Judaism in shaping the origins and development of western concepts of law cannot therefore be easily

quantified.[150] It is therefore of universal importance and agreement that laws are general principles for the general guidance of the society. This does not describe Yoruba (African) jurisprudence in a special or unique way.

What follows from the reading above, however, is the view that every culture has sets of principles which could be described as principles of law. Just as there are legal principles in Western jurisprudence, the same can be said of African jurisprudence. What differs from one jurisprudence to another could be, for example, in the source(s) of those principles, in what they inhere and consist, and significantly, how they are applied to show their veracity as body of juristic thoughts within that society. For example, in Yoruba jurisprudence, some elements of principles that reflect the nature of law among the Yoruba people are reflected in proverbs and sayings. Though proverbs are found in every culture, however, the elements used to convey truths in proverbs and their meanings differ from one society to another.

Therefore, in matters of law and justice, proverbs assume a functional role as principles and vehicle of juristic thought and a vital aid to judicial administration. One Yoruba proverb explicitly makes this point: *Owe l'esin oro, Bi oro ba sonu, owe laa fi wa* meaning "proverbs are the vehicle of thought. Where the truth is elusive, it is proverbs that we employ to discover it."

The misinformed arguments of many aliens were that there was little or no law except the despotic will of chiefs in Africa. The description of Yoruba (African) jurisprudence as the contention that law is a code of general principles, not of details, for the general guidance of human conduct is an attempt to show, not that this is unique to Africa, but to demonstrate that there was in most African societies, for

[150] See Carl J. Friedrich, *The Philosophy of Law in Historical Perspective*, Second edition, Chicago: University of Chicago Press, 1963, p. 8.

example among the Yoruba people, a sophisticated conception and system of law before the arrival of colonialism.

It is in this sense that we must understand Lambert's exposition on the general view of law among the Kikuyu Tribe in Kenya. According to Lambert, this ideal of African jurisprudence is also instantiated in the legal and judicial practices of the Kikuyu tribe in Kenya. In the words of Lambert,

> *The widely held view that Africans have not yet evolved a code of law requires some qualification. Every tribe has a code, but it is a code of general principles, not of detail. Every judgement must conform to it, though the principles are applied with a latitude unknown to European law.*[151]

3.6.2.3THE CONTENTION THAT LAW IS A REFLECTION OR AN EXPRESSION OF THE LIFE-FORCE OF COMMUNAL UNION.

Yoruba (African) jurisprudence consists in the proposition that law is a reflection or an expression of the life-force, the inner self or the soul of a shared, communal or public union. This theory of law is akin to Herder and Savigny's theories of law as popularly expressed in the Romantic Movement although it is not clear whether this conception of law is an historical coincidence in thought or there is the likelihood of a cultural borrowing. But then, a little reflection is needed to point out the sameness of this theory of law among Africans with the leading figures of the Romantic era.

Around the eighteenth century, the Romantic Movement in political and social philosophy sprang up as a popular and vehement academic and cultural opposition to the dicta and principles of natural law on the idea of the state. What the Romantic reaction spearheaded in the popular conception of the philosophy of the state is the view that each state and its law possesses a unique character that can be best

[151] H. E. Lambert, *Kikuyu Social and Political Institutions*, 1956, p. 118.

understood in the light of every historical period, civilisation and more importantly, every nation. In other words, that each state or nation possesses its own individual character and qualities which cannot be submerged in another without losing its vitality, vigour and vivacity.

This jurisprudential movement was spearheaded and postulated by Herder, a radical figure of the Romantic era. According to Herder, any attempt to bridge these innumerable manifestations under the general command of a universal idea of state prompted by the instincts of natural law based on reason was inimical to the free development of each national spirit, what he called (*Volksgeist*). One likely consequences of having such a general law of nature, according to Herder, is that it could result in imposing a crippling uniformity.[152] According to Herder, different states, cultures and societies developed their own values rooted in their own history, traditions and institutions, and that the quality of human life and its scope for self-expression resided precisely in this plurality of values, each state being left free to develop in its own way.[153]

The remains of this trend in Romantic reaction to natural law in jurisprudence were further heightened to the point of historical significance in the thoughts of F. K. von Savigny. According to Savigny, the legal system of any state is a symbol and vital part of the culture of a people. Law, therefore, as a reflection of the state in vogue is not the result of an arbitrary act of a legislator but developed as a response to the impersonal powers to be found in the people's national spirit i.e. the (*Volksgeist*). Law, according to Savigny, is then a unique, ultimate and often mystical reality linked to the biological heritage of a people as reflected in the operations of its state.[154]

[152] See Berlin, I. *Vico and Herder*, (1976), p. 175.
[153] Ibid., p. 153.
[154] See Stone, *Social Dimensions of Law and Justice*, (1966), p. 102.

Just in the same tone with the German Romanticists, Yoruba (African) jurisprudence endorses the view that law is a reflection of the inner life, the life-force and soul of a shared, collective, communal and public union. The following can be deduced from the statement above. In the first instance, a collective and communal union or tie is necessary to the activation, fulfilment and optimal realisation of law. In other words, laws find their ultimate realisation and fulfilment in the community of men. It is in this sense that laws are also spoken of as non-existent in the absence of a community of men. The inference could then be that law is a social phenomenon. Within this kind of communalism, probably, it is one thing that such laws exist and it is a different thing altogether if such laws are not written down.

For example, in Yoruba society before the advent of colonialism, laws in the land were basically unwritten but they tend to have become intestinal to the lives of the people. That such laws are not written is not an indication of the non-sophistication of such laws but an indication that the society in question was non-literate. According to Adewoye, law in Yoruba community was "latent in the breasts of the community's ruling elite or of the court of remembrance, and was given expression only when...called for."[155]

In the second instance, laws have their own life-force or inner self especially when considered in the light of the history and growth of a particular community, society or nation. The growth of the life-force is an indication of growth and continuity of the community concerned. Perhaps, it is in this sense that law is seen to be one of the instruments that hold society together. And also, this explains why in some societies, a break in law is seen to be an offence against not just the holders of

[155] Adewoye, O. *The Judicial System in Southern Nigeria, 1854-1954*, London: Longman, 1977, p. 3.

powers within that community or state but as an offence against the life or soul of the community concerned.

In the third instance, it is obvious that an interpretation and understanding of laws within this kind of society falls back to an understanding of this life-force or soul of the community. An encounter with law is an encounter with the life-force of that community. An example of an encounter may be paying very close look at the order of marriage institutions, festivals, traditional and customary practices or even a critical and close examination of some of the fundamental tenets of the religion in practice in those communities. The idea is that all these practices have the advantage of the conveyance of the life-force or soul of that community.

Part of that encounter may also be the study of the language of that community. In a nutshell, the total framework of the culture of the people typifies the essence and substance of the life-force and soul of that community. And what is more, it is within the realm of conceptual possibility that this life force through which the concept of law is to be interpreted and understood constitutes one of the major heritages of that community.

But one of the problems with this conception of law is how to underscore or quantify in empirical terms what is referred to as the life-force or soul of a community. Apart from what is clearly expressed as normative statement regulating human lives, must there be anything referred to as a life-force which makes those normative statements readable, understandable and meaningful? What, in essence, is this life-force? Is it comprehensible in empirical terms? A tempting conclusion on this conception of law is the difficulty it creates in a scientific study of law within given societies.

It is in this sense that one can understand also the observation of some scholars about the nature of law in Africa. For example, according to M'Baye, African theory of law offers only an opportunity "to live under the protection of the community of men and spirits"[156] that there are no individual rights, since the individual has no role to play in legal relations.[157]

Even though the observation of M'Baye concerning this aspect of African jurisprudence is relevant, it is nevertheless incorrect about the true nature of African jurisprudence. The observation is relevant in as much as it raises serious concern about one of the features of African jurisprudence which is the centrality of communalism to African legal theory. The relevance of his observation to African legal theory can also be judged from the fact that it provides an insight into the meaning of the idea of law as the reflection of the life-force of a community. The 'life-force' in question may just be, according to M'Baye, a community of spirits.

But the incorrect nature of the observation stems from the fact that it distorts in essential terms the true nature of African jurisprudence with respect to the status of the individual. To have drawn a connection between a community of men and spirit and the absence of individual rights in African law is too hasty a conclusion and an unwarranted generalisation on the nature of African jurisprudence. For one thing, it is true that a purely individualistic agenda is somewhat unpopular in African society, but then it behoves one to state that the idea of communalism does not completely whittle away the power or the weakness of the individual in the whole gamut of legal and social relations in African society. Mbaye's conclusion on the nature of African jurisprudence is thus a myth, or at best, factually false.

[156] M'Baye K. "The African Conception of Law" in *The Legal Systems of the World and their Common Comparison and Unification*, International Association of Legal Science Vol. II, 1975, p. 138.

There have been various dimensions to this mythical interpretation and re-interpretation of African law. For example, some are of the view that the basis of operation in African law is communalism not individualism. Even though a communal bond exists, it does not vitiate the status of the individual. There is a wide and general recognition of the rights of the individual as well as the rights of the collective. The relationship therefore is a symbiotic one. This is echoed in the pertinent observation of Max Gluckman. According to Gluckman, the failure of one tribesman to perform his legal obligations may "lead to severe disruptions of general relationships, and even ultimately to the break-up of the group."[158]

Reading from this line of thought, one could come to the conclusion that the individual-community relationship is one of mutual dependence. The individual spells and safeguards his rights within the ambience of the communal life and spirit while the continuity of the community in turn is enhanced by the type of reciprocity it receives from the free and unhindered dispositions of rational individuals within its space. Within this kind of reciprocal relationship, individual life is not only enhanced, it derives meaning and significance.

Furthermore, it is evident that the proponents of this myth about African law are only been exaggerative about this aspect of African law. If the individual has no rights within this kind of jurisprudence, what then do we make of the idea of punishment hinted at under African law? For example, when an individual has committed a crime, within the structure of law operative in that society, he is punished for the offences committed. The rights of protection that he used to enjoy in the relevant communal sense are withdrawn and suspended. The punishment is

[157] M'Baye K. "The African Conception of Law" in *The Legal Systems of the World and their Common Comparison and Unification*, International Association of Legal Science Vol. II, 1975, p. 143.
[158] Max Gluckman, "Natural Justice in African Law" in *Legal Cultures*, Varga C. (ed.), 1992, p. 176.

applied on him and the significance of this is the view that what was considered as rights previously ceases to be rights because of the breach in the communal life.

To this end, whether in punishment or outside the purview of punishment, what is meaningful in this kind of interaction is the place of the individual vis-à-vis the community. As argued by Dlamini, the individual shoulder primary liability for wrongs committed while the other members of his group may, in certain circumstances, bear secondary liability. In his words, this applies when "someone is acting in *loco parentis* or is liable to contribute for the misdeeds of the offender."[159]

Furthermore, emphasis on rights in African law only transcends the individual not lessen the severity nor vitiate its status. There is a difference between the 'erosion of the status of' and that of 'transcending the status' of. African law's emphasis on collective and social cohesion is not at the expense of the rights of the individual within that community. This clearly debunks the exaggerated opinions of Fortes concerning the philosophy of society held by the Tellensi of Northern Ghana in West Africa. Fortes had claimed that "the solidarity of the whole is stressed at the expense of their individual private interests or loyalties[160]among this tribe in Northern Ghana. This opinion is a myth, or at best, an exaggeration.

In Yoruba philosophy of law, for instance, social cohesion and communal obligation do not make the status of the individual either insecure or irrelevant. One Yoruba proverb explains this fact in vivid terms. Among the Yoruba people, *oko ki i je ti baba t'omo ko ma ni aala* meaning that "a farm that ostensibly belongs to father and son invariably has its boundary or demarcation."

[159] Dlamini, op. cit., p. 80.
[160] Quoted in Basil Davidson's *The African Genius*, p. 71.

One of the complex historical processes behind the success of the African philosophy debate, as emphasised by Oruka and others, is what is called sage philosophy. As propounded by Oruka, sage philosophy is a healthy practice indicating the presence of a critical and rational spirit in African communal or traditional societies.[161]

But the most important truth about sage philosophy is that it is individualistic, not a communal ability. This will run against the opinion of John Mbiti that in Africa "a person cannot be individualistic, but only corporate."[162] This is to overdraw the picture of African traditional life. One rebuttal of this point is the view that sage philosophy does not seem to have any impact on legal philosophy. It is only an approach to the study of African philosophy which could be so for other cultures in which sages can be found. It is not a theory of law. Its importance and connection with African jurisprudence will have to be proved not assumed.

Truly sage philosophy is not a jurisprudential theory but it is supportive of a jurisprudential theory in the African context. The support it generates for African jurisprudence consists in the fact that, given the truth of its proposition for African philosophy, it helps to picture adequately the position of the individual under African law. If sage philosophy constitutes one of the promising approaches through which the veracity of African philosophy can be proved and validated, it also by extension provides a clue to the status of the individual under African law.

Moreover, if it is the case that African jurisprudence is an integral part of African philosophy, it also shows that philosophical sagacity could have been one of the abiding circumstances under which African theory of law developed and was

[161] Henry Odera Oruka, "Sagacity in African Philosophy," in *African Philosophy: The Essential Readings*, ed. Tsenay Serequeberhan, New York: Paragon House, 1991.

fermented. It is not possible to have and accept a system of sage philosophy and not expect a proper jurisprudence to be in place in such a society. Under this kind of philosophical condition, the existence of a theory of law or jurisprudence is not only hypothetical but also a tangible and actual possibility. The reason is that the jurisprudence of a people is one of the indications of a people's philosophical attempts to systematize on their relation to the universe. Thus, it is the case that the individual in African society "develops the sense of duty and obligation to live and work for the whole"[163] but then it does not in any way vitiate the rights, obligations and responsibility of the individual in African philosophy of law and society.

3.6.2.4THE CONTENTION THAT LAWS ARE RECOGNISED AS CONSTITUTING AN OPERATIONAL NORMATIVE SYSTEM EMBODIED IN UNWRITTEN BUT WIDELY ACCEPTED USAGES AND PRACTICES IN FORMS OF COVENANTS AND CUSTOMS

Yoruba (African) jurisprudence reflects the proposition that laws constitute an operational normative system embodied in unwritten but widely accepted usages and practices in form of customs. The character of Yoruba law as embodied in customs and practices of a people can provide some general consideration on the likely nature of African jurisprudence, specifically, and on the nature of law, in general.

In the first instance, this proposition on the nature of Yoruba (African) jurisprudence shows that what is important in a jurisprudential system consists in its acceptance and not necessarily in the fact that the set of law is written down. It is said that the body of law guiding and controlling political and legal life in Britain is an unwritten one. This is unlike the American system which is basically written. Yet both societies are credited with a specific and distinct jurisprudence. Both systems, whether written or unwritten, constitute a body of accepted rules and laws. The notion of acceptance is therefore of paramount importance in considering the idea of

[162] John Mbiti, *African Religions and Philosophy*, Garden City, N. Y.: Doubleday, 1969, p. 209.

law. General debates on the notion of legal validity in jurisprudential discourses is never complete without touching on the fact that legal validity derives from the theory of acceptance. However, what constitutes acceptance of a system of laws differ from one society to another. But the general condition of legal validity is built on the theory of acceptance i.e. societal or public acceptance.

The second point to note from this understanding of Yoruba (African) jurisprudence in relation to the idea of customs shows that laws and their acceptance are built not just on a statement of facts but in that those requirements are indeed normative statements requiring that certain actions are either prohibited or accepted. In other words, that law is not a statement of facts but normative statements. As normative statements, it follows that laws are laid down rules prescribing a course of conduct with an indication of what should happen in case there are defaulters. In other words, laws are prescriptive not descriptive statements.

In the third instance, this understanding of Yoruba (African) jurisprudence shows that customs and covenants, essentially enshrined as operational normative system, constitute one of the sources of law even though it is true that they are largely unwritten but widely accepted. In fact, for Yoruba (African) jurisprudence, customs have had the privilege of a legal character in African history. But then, the negative attitude often cast around African law, as it pertains to specific cultures such as the Yoruba culture, Igbo culture, Akan culture, Barotse culture and so on, stems from the misunderstanding of the notion of customs or customary law in African political and jurisprudential settings. It is in this sense that Pekka Seppala contended that customary law has a paradoxical position in relation to the corpus of statutory

[163] E. A. Ruch and C. K. Anyanwu, *African Philosophy*, Rome, 1984, p. 375.

laws in general and in relation to Africa.[164] For him, the paradoxical position of customary law in Africa today derives from the fact that the ideal of legalism was not the aim of colonialism: the legal apparatus was subsumed to political and economic colonisation.[165] But then, the question is: what is the nature of customs or customary laws? What is its place in the nature of Yoruba jurisprudence and in Africa in general?

Sometimes, in a reflection of European negative attitude towards African ideas, customary law has been described as immutable tradition.[166] In another vein, customary law has been linked with genealogies and folk tales, all equally myth, meaningful, rather than an objective record.[167]The missing point in all these conceptions of customs and customary law consists in the absence of intellectual sincerity in the understanding and study of the import of customs and the ascription of legal significance for the people concerned.

On our part, analysis of the nature of African jurisprudence in the light of customs should be furthered by considering the internal aspects of customs and customary law. In this light, the conceptual model highlighted by Seppala could be profitably adopted. According to Seppala, the meaning of customary law can be confined to the "statutory jurisprudence where custom is taken as the explicit starting-point of a state legal organ, or where a local organ is recognised by the state machinery (with a possibility of appeal to state legal organs, or merely by granting of authority).[168] The worth of this conceptual characterisation of customary law consists in the fact that it provides, for intellectual study, the scope and hierarchical nature of customary law. Again, the worth of the model also consists in the fact that it accords a

[164] Pekka Seppala, *The History and Future of the Customary Law in Kenya*, Occasional Papers 13, Helsinki: Institute of Development Studies, University of Helsinki, 1991, p. 1.
[165] Pekka Seppala, *The History and Future of the Customary Law in Kenya*, p. 3.
[166] See Kristin Mann and Richards Roberts, op. cit., p. 4.

sense of jurisprudential legitimacy or validity to customary law contrary to prevailing attitudes.

The weakness of the theory or model can, however, be located in the fact that while it grants customs as the basis for what is known as customary law, it is nevertheless silent on the internal aspects of the nature of customs which imbue customary laws with their sacredness. In other words, it fails to identify the source of validity of customs and customary laws other than their ascription of a jurisprudential character.

It is in this sense that it can be contended that customs are traditional, moral and religious expectations, ideas and ideals embedded in a people's culture existing in many alternative and changing forms. These changing forms could either be historical, economic, political, legal, institutional or even social circumstances. Customs are thus the moral ideals that are relevant in any meaningful discussion of the legal tradition in Africa. Customary laws, therefore, are the jurisprudential forms and modes in which these expectations, ideals and ideas are transmitted, disseminated and encoded. Therefore, customary laws which derive prominently from customs are critical aspects of what people are found to do and what they accept as binding on them. It is in this sense that Alan Watson argues that

> *The nature of custom is quite unlike that of any other source of law. Other kinds of law making are, at least in form, imposed on the populace from above; custom represents ...what people do [and accept] as having the effect of law*[169]

The customary nature of Yoruba (African) jurisprudence is thus a fundamental aspect of Yoruba ontology. Arguable, at least from the ontological point of view, is the claim that there is always a line of demarcation (no matter how thin) between the

---

[167] Chanock, M. *Law, Custom and Social order. The Colonial Experience in Malawi and Zambia*, Cambridge: Cambridge University Press, 1985, p. 8.
[168] Pekka Seppala, op. cit., p. 4.

realm of the legal and the realm of the moral in Yoruba philosophy of society. It is in this sense that we must understand Paul Bohannan's description of customs as "norms or rules (more or less strict, and with greater or less support of moral, ethical, or even physical coercion) about ways in which people must behave if social institutions are to perform their tasks and society is to endure."[170] In relation to law, Bohannan posits that law is a restated custom.[171] The basis of obligation towards them and their acceptance altogether, according to S. Diamond, consists in the fact that they are "intimately intertwined with a vast living network of interrelations, arranged in a meticulous and ordered manner."[172]

In controversial terms, some scholars have tended to portray the idea of customs as less deserving of the name of law, particularly as it applies to the African conundrum. In their estimation, customs may involve an aspect of law but it is not law. In relation to Africa, the characterisation of customs as lacking the element of law is taken to indicate that Africa is ruled by customs and therefore belongs exclusively to the regime of the past in which all that matters is the elevation of tradition. Customs reflect tradition and the past, an age that is essentially backward. Law, on the other hand, is a refection of growth, modernity and civilisation.

Significantly, according to this view, law signifies Eurocentric dynamism while custom is a reflection of the stupor of Africanism. Incidentally, this kind of attitude is reminiscent of the heartbeat of mainstream jurisprudence. A little reflection will show this. For example, Paul Radin contends that

> *A custom is, in no sense, a part of our property functioning culture. It belongs definitely to the past. At best, it is moribund. But customs are an integral*

---

[169] Alan Watson, *Sources of Law, Legal Change and Ambiguity*, 1984, p. 1
[170] Bohannan, P "Differing Realms of the Law" (1965) 67 *American Anthropologist*, No. 6, Part II 33.
[171] Bohannan, P (note 15 above) 33.
[172] Radin, P (1953) *The World of Primitive Man* New York: Grove Press Publication 223.

> *part of the life of primitive peoples. There is no compulsive submission to them...*[173]

In a similar sense, Diamond posits a separability thesis between law and custom. In his words, "the customary and the legal orders are historically, not logically related. They touch coincidentally; one does not imply the other. Custom, as most anthropologists agree, is characteristic of primitive society, and laws of civilisation."[174] On his part, William Seagle opines that the attempt to treat law as customs or law and customs as the same results in confusion. According to him, the essential character of primitive order is not law and cannot be law but customs, which goes to show their differences. In his words,

> *Whether primitive societies have law or custom is not merely a dispute over words. Only confusion can result from treating them as interchangeable phenomena. If custom is spontaneous and automatic, law is the product of organised force. Reciprocity is in force in civilised communities too but at least nobody confuses social with formal legal relationships."*[175]

In his conclusion, the rendition "customary law" though semantically wrong, portrays the recognition given to the distinction between the two. Even though this observation appears tight, a little reflection, however, will show the absurdity in the unnecessary semantic and logical distinctions between law and customs and customs as law. Our contention is that law and customs are not antithetical to each other.

This declaration is not the conclusion of an argument. It has to be argued for, not just stated, even if it is true. The grounds for this contention are as follows. In the first sense, it is to introduce a false problem in the understanding of the nature of law in primitive societies. Secondly, by making a distinction between law and customs, necessarily projected in jurisprudence is a racial divide between kinds of epochs and culture. Besides, law and custom are never antithetical terms.

---

[173] Radin, P (note 17 above) 223.
[174] S. Diamond, "The Rule of Law versus the Order of Custom" (1971) 38 *Social Research* 42 44

Writing on the judicial process among the Lozi of Barotseland, Gluckman observed that

> *Law can only be posed in anti-thesis to non-law. Custom has the regularity of law but is a different kind of social fact...the judges may use even the least important of customs as a check on the varied flow of social life. Therefore the jurisprudential conception of custom as one source of law, in the sense of judicial decision, and also as a part of the whole corpus juris, can be applied without distortion to the Lozi data.*[176]

Given the relevant facts, therefore, it is our revered opinion that to make a distinction between law and customs, especially in relation to Africa, by some legal scholars, is to introduce into jurisprudence some elements of scepticism and racism that characterise the thoughts of eminent philosophers such as David Hume and Hegel into the enterprise of philosophy. Perhaps, the entire framework of jurisprudence would have been done a great service if pertinent issues that pertain to how customarily laws can evolve, without losing their essence and internal force, to be a system of enacted laws in the present era, are engaged in meaningful jurisprudential disquisitions.

It is to be noted that a neglect of the customary dimension of law is responsible for the myopic understanding of law in general. Therefore, the importance of customary law for the legal systems of nation-states and contemporary jurisprudence cannot be overemphasised. This is pertinently echoed in the words of Lon Fuller. According to Lon Fuller, "it still remains true that a proper understanding of customary law is of capital importance in the world today...upon the successful functioning of that body of law world peace may depend."[177] The importance of customary laws to general jurisprudence, especially as advocated in Yoruba (African) theory of law, can be itemised as follows:

---

[175] Seagle, W (1946) *The History of Law, Tudor* 35.
[176] Gluckman, M (1967) *The Judicial Process among the Barotse* 261-262.
[177] Lon Fuller, "Human Interaction and the Law" in 14 *American Journal of Jurisprudence*,1, 1969.

In the first place, customs as law forms the essential bulk and body of international law. What serve as treatises, international conventions and statutes are commonly derived from the substance of customs and conventions within states and nations that are members of such international organisations. In the second place, customary law is that body of law which makes the governance of states and nations body possible simply because they are internally generated.

This explains the difficulty that most nation-states in Africa, for instance, are engrossed with in the transition from customary laws to enacted laws which are the legacy and product of colonialism. Therefore, the jettisoning of customary laws, in favour of enacted laws in Africa explains the difficulty in ensuring proper governance and effective administration of such independent states. The question is will our problems of governance and administration abate if we return to customs instead of enactments? The issue is not returning to customs but that even with the transitions to enactments what is provable and sound for administration and governance in customs of a particular society should be adopted. Colonialism represents a phase in African history which affected many aspects of African life. The attitude and reactions towards customs represents one of the harsh phases of colonialism on African history. According to Mann and Robert,

> *The use of British courts by Africans profoundly affected indigenous laws, despite the colonial government's commitment to apply local law to local peoples. Many African practices failed the repugnancy test, in which case British officials decided cases on the basis of what they thought was right. Even when local practices were not deemed repugnant, magistrates and judges often misunderstood indigenous law, upholding in the name of custom practices that were not customary at all.*[178]

Thirdly, the importance of customary laws consists in the fact that it enables us to have an integrated understanding of enacted laws itself, whether laws of

internal consequence or the nature of international law. In fact, we cannot understand international law except there is a whole hearted understanding of the nature of customary law. Customary laws constitute one of the vital sources of international law. This is because customary laws have the nature of law and as such it provides some of the clues to a critical understanding of the nature of law.

However, regardless of this postulate, there are series of objections and criticisms that can be levied against Yoruba jurisprudence, and by extension, African jurisprudence in general. For intellectual convenience and better understanding, these objections can be viewed as a general observation on the nature of Yoruba and African jurisprudence. In the first place, it is suggested that the conceptual framework and cultural scheme in which Yoruba and African jurisprudence are placed and interpreted projects the feeling of a jurisprudence that is grounded in cultural uniqueness. In other words, that, among its proponents, if Yoruba and African jurisprudence is to serve its place in the comity of jurisprudential ideas it can only achieve that if it is defined in a culturally unique way. The objection further observes that granted that this is true, it then follows that Yoruba (African) jurisprudence should be held guilty of one of the instances of separability thesis it accuses western jurisprudence of committing which is that of separating human beings and their respective spheres of existence.

The second objection consists in the view that the discussion of African jurisprudence here tends to suggest that the African legal tradition is a mono-cultural phenomenon. This is open to doubt since the African continent is a multicultural one and to that extent, to present a legal tradition that is mono-cultural is to present what is empirically false and untrue about Africa.

---

[178] Mann and Robert, *op. cit.*, pp. 13-14.

The third objection is that it is not clear which tradition is being projected by Yoruba (African) jurisprudence as its contribution to general jurisprudence. Given the historical reality of Africa, there are many dimensions in which the legal tradition in Africa can be viewed and interpreted. The problem is that of identifying the African theory of law or tradition that is being canvassed. Possible candidates for this theory or tradition include that of (i) contemporary Africa as constituted by the colonies, (ii) some distant entity that culturally exists no more, and (iii) a parallel culture of the pre-colonial era which is still discernible in postcolonial Africa?

The first general attack against what is conceived to be the contribution of African jurisprudence is the claim to cultural uniqueness. The question then is this: is the idea of uniqueness not a negative claim for African jurisprudence since it establishes a form of culturally based conceptual dichotomy? Where the idea of uniqueness is spoken of, it is spoken of not as a way of creating a dichotomy in the conceptualisation of jurisprudential ideas and notions. Rather, where the idea of uniqueness of African jurisprudence is spoken, the relevant idea is the projection of what is distinctly African in terms of the development of African self knowledge in the area of jurisprudence.

In other words, what it does by nurturing the idea of uniqueness is making an attempt to develop substantive issues in African experience which is of course informed by certain socio-historical contexts which may not be peculiar to the African continent alone but has been instrumental in the formation of the African identity. As argued by Onwuejeogwu, "the political crises that occurred in Africa immediately after many countries became independent have made many African intellectual reassess their political thinking, which had been based on models mirroring the American, British and French systems...It is becoming clear to Africans that the

operation of these systems is affected both directly by the traditional politics and behaviour of those who run the government, and indirectly by the traditional political systems which are still alive in the non-urban and rural areas..."[179]

A relevant socio-historical context in this sense is colonialism. But then, colonialism is not the peculiar experience of Africa. Even then, the truth of this statement does not detract from the authenticity of the view that though colonialism is not peculiar to Africa, but the effects could have been received and applied in different terms which forms uniqueness for the experiences of Africans.

As argued by Mann, law was central to colonialism as conceived and implemented by Europeans and as understood, experienced, and used by Africans[180]. One of the distasteful outcomes of colonialism via the instrument of law was that it sought to impose a new moral as well as political and economic order, founded on loyalty to metropolitan and colonial states.[181] The leviathan that colonialism invented in the subjection of colonial people and in the legitimation of the project of colonialism was the idea of the rule of law. Through the idea of rule of law, various interpretations and conceptions of morality, culture and education were driven on colonial soils. These interpretations afforded the aegis of providing unique experiences for the colonised people.

As hinted by Murungi, Euro-Western jurisprudence is basically founded on force as witnessed during colonial times while the relevant pieces of African legal thought systems endorse a system of consensus and social cohesion. A claim to cultural distinctiveness is incomplete where the significances of historical experiences are omitted. A jurisprudence that lacks history is a fake one. The experiences of history

[179] Onwuejeogwu, M. A. *The Social Anthropology of Africa*, Ibadan: Heinemann Educational Books, 1992, p. 115.
[180] Roberts, R. and Mann, K. "Law in Colonial Africa" in *Law in Colonial Africa*, edited by Roberts, R. and Mann, Portsmouth, NH: Heinemann Educational Books, Inc., 1991, p. 3.

cannot be similar in every detail for two societies. The dissimilarity in history is what ascribes uniqueness to a particular jurisprudence. For example, the history of the west is different from that of the east, the Asians, or the Africans.

What forms the heart of Orientalism is obviously different from the substance of Occidentalism even though these cultural substances can be learnt, given the opportunities afforded by time. It is in this sense that the cosmic-minded Leibniz, appealed for the mingling and cross-fertilisation of Occidentalism and Orientalism. In his words,

> *The condition of affairs among ourselves is such that in view of the inordinate lengths to which corruption of morals has advanced, I almost think it necessary that Chinese missionaries should be sent to us to teach us the aim and practice of national theology...For I believe that if a wise man were to be appointed judge...of the goodness of peoples, he would award the golden apple to the Chinese."*[182]

The same can be said of the continent of Africa. The heart of African history, of which its jurisprudence shares a part, is substantially different from the history of other parts of the world. World history is a pattern of distinct messages appearing and appealing from different perspectives. It is in this sense that African jurisprudence acquires its uniqueness i.e. in the fact that it has a history that is in line, not with others, but in line with substantive issues in the African experience which is enough to construct and develop the basis for African self knowledge. This is why Onwuejeogwu concluded that "the traditional political systems in Africa are different from those of the people of the first and second worlds because the systems have developed in areas with different cultural and historical settings...European-acquired legal systems seem to be invading the countries from the outside and not growing from the inside.[183]

The heart of the second objection has been answered somewhat in the reference to the debates between Okafor and Taiwo. To claim that the alleged unity

---

[181] Ibid., p. 3.

of African law is a myth is to arrive at a view of African law that neglects facts as well as frame. As hinted earlier, it does not appear controversial to claim that there is a sense of unity in African jurisprudence. Apart from the fact that this jurisprudence is informed by a relevant portion of historical similarity, the institutions and cultures tend to share and borrow from each other.

Rightly, and agreeably, Taiwo's analysis points out the fact that Africa may not have a single tradition or dominant tradition to warrant labels of 'African this' or 'African that'. He also makes the point that the common occupation of a geographical continuum should not be mistaken for social consensus.[184] However, the problem with Taiwo's denial of anything that may be labelled 'African legal philosophy', 'African ethics' or 'African religion' is that such denial borders more on mere assumption than facts.

In actual fact, emerging facts borne out of anthropological researches and studies contradict Taiwo's assumption. What Taiwo has succeeded in doing in his paper consists in the attempt to legitimise the view that African legal tradition is simply on the same conceptual worldview with western jurisprudential tradition, and as such not remarkably different.

Nothing, however, can be farther from the truth than this. What then would Taiwo mean by 'African philosophy', if notions of African legal tradition, African culture, African identity or African traditional values are self-defeating? When we deny the existence or possibility of African culture, what we are consciously doing is given a kind of stamp of acceptance and validity to the age long belief that the history of philosophy is uniquely that of Western philosophy and nothing else. When we

---

[182] Quoted in Will Durant *Our Oriental Heritage*, p. 693.
[183] Onwuejeogwu, *op. cit.*, pp. 115-116.
[184] Ibid., p. 198.

maintain a kind of silence on what is meant by African philosophy what we are doing is defining philosophy as strictly western.

A careful study of African socio-political history shows that even though one could surmise a variation in details in the legal tradition, it only stops at variation of details and not of essentials. One could legitimately talk of African political and legal systems within the tone of some glaring and observable similarities and arrive at certain, obvious conclusions without fear of unwarranted or hasty generalisations. This is because there appears to be more that connects African societies and communities together rather than what divides those societies.

It is true that African societies are multicultural and multiethnic but then it appears strongly that there is a form of universal conclusions that can be drawn about African life which is stimulating for research. According to C. K. Meek, there is a kind of uniformity and similarity in African political cum legal set up. In his words, "it is clear that throughout Africa most kingdoms were modelled on the same principle. The Jukun state is of the same pattern as that of the Bornu or Songhai in ancient times, and does not differ much from that of Benin or Oyo at the present time."[185]

This thesis receives corroboration in the thoughts of Delafosse who contended that "whatever be the degree attained by the political institutions of the African Negroes and whatever aspect civilisation of their various States presents, their organisation and functioning, everywhere and always, offer the same essential characteristics."[186] But then, it is possible to contend that this observation about African political and legal systems, if it is to be well understood, must be seen as a defect in our cultural, political and social cum legal life, not a virtue in as much as it stifles the outcome of intellectual research. There are two sides to this objection:

[185] C. K. Meek, *A Sudanese Kingdom*, London: Kegan and Paul, 1931, p. 346.
[186] Delafosse, *Negroes of Africa*, Washington, DC: Associated Publishers Inc., 1931, p. 144.

one, this kind of uniformity makes a research of any kind about Africa a research into the obvious, and secondly, this being so, it presents nothing worthwhile to contribute to intellectual exchanges and discourses. Hence, this aspect of African life, if it is true at all, is to be seen as a defect rather than a virtue.

An enlightened and articulate response to this objection consists in the fact that its substantive thesis is conceived in what can be referred to as ***'fact isolationism'*** i.e. isolation of facts in its very conclusion. If it is true that similarity in African political and social systems carries nothing of interest for a researcher, then one should ask whether intellectual efforts in various fields about the African past, present and future are all stillbirths, redundant engagements, superfluity of nothingness or inimical to the substance of proper intellectual work. As summarised by Elias,

> *it is not to be expected that, amidst such a diversity of peoples and in such a considerable land area as the African continent, any uniform and invariable pattern of society should exist...but in spite of this diversity, we have to bear in mind the strong evidence of general similarities which writers who have studied Africa at first hand and appreciatively, have vouchsafed to us.*[187]

In fact, the implausibility of the second objection can be summed up in the fact that if a vast continent like Africa is able to accommodate general similarities for its vast land and mass of people, the very fact of those similarities are worth researching into. The very fact of similarity should necessarily raise questions in our minds. For example, one could ask: what accounts for the similarity between African political and legal systems in spite of diversities and pluralism? At what point do those diversities fade away into similarities and vice versa? What social mechanisms have been responsible for the maintenance of grand similarities between these respective, differing cultures in Africa? What can be learnt in the face of these similarities? What is the place of the philosophical problem or controversy over universals and particulars

in this aspect of African life? These and many more questions are pertinent subject of research.

The third general objection is that Yoruba, and by extension, African jurisprudence and its contribution to general jurisprudence is not doubted except that it is not clear which tradition is being projected in that jurisprudence. A critical understanding of the concept of law in Africa transcends the era of imperialism. Africa is inseparable from her history and culture. Her history is the record of what she thought, said and did. Her culture derives from the totality of her ideas, concepts and values that characterise the society she found herself. Essentially, therefore, a people cannot be understood if their history is divided. Significantly true is the view that within that variegated history, the nature of a people can be well understood. To create a historical bifurcation is to distort the essence of their continuity. African legal philosophy is enmeshed in this kind of historical coherence and completeness. The historical variegation and dichotomy can still be studied for what it is. It is worthy of note that what is essentially outside the frame of its reality can also be critically understood.

Every African, just as anyone in the world, is continuously becoming. It is in this sense that one can intelligently understand what is meant when it is said that to understand the future is to appreciate the present and the appreciation of the present consists in studying the past. The past, the present and the future are thus to be seen as a holistic construct. Even if an aspect of a people's culture, life and history no longer exists, the fact is that it can still be studied. Besides, to exist is not just to be qualified and quantified in physical terms, it can exist in the collective memory and consciousness of the people in question.

---

[187] T. O. Elias, *The Nature of African Customary Law*, p. 8.

For example, colonialism in a limited sense of historical and political colonialism no longer exists in Africa but its history as that of cultural and political dislocation and domination exists, most prominently and in the paramount sense, in the collective memory and consciousness of the people. Colonial laws, for example, no longer exist but then its vestiges are still discernible in the jurisprudence of the postcolonial African states. As contended by Kristin Mann and Richard Roberts, colonialism changed African law with respect to the content of its rules, institutions, procedures and meanings. It affected as well the way African peoples perceived and understood law. Any understanding of the role of law in contemporary Africa must rest on an appreciation of the legal rules and institutions, processes and meanings created under colonialism. The history of law in colonial Africa forms an important chapter in the story of the expansion of western law overseas.[188] These are aspects of African history which can still be studied in as much as they are still discernible in the collective memory of the African life and appreciably in the institutions that still exist. The real can still be distilled from the mundane.

3.7 CONCLUSION

This chapter has taken us through a long discussion on what the nature of an African jurisprudence would look like. In particular, it has demonstrated, as a tentative proposition, what the nature of Yoruba jurisprudence or philosophy of law can be said to be. The method adopted has been a critical appraisal of the stages involved in proving the existence of anything eminently African, including a consideration of its intellectual and philosophical significance. These stages include the expression of the fact that the African jurisprudence project is an integral part of African philosophy in general. From this, the chapter examined the persistent

[188] Kristin Mann and Roberts, "Law in Colonial Africa" op. cit., p. 5

questions on the nature and existence of African jurisprudence. It discovers that African jurisprudence actually exists as a body of philosophical thought on the significance of law in African society. From this conviction the chapter constate that African jurisprudence, once understood in its basic fundamental postulate, has a significant contribution to make in the body of existing jurisprudential debate.

In order to justify this assertion, the chapter considers five basic theories on the nature of Yoruba political philosophy and sought, in the process, to ferret what can be said to be the substance of Yoruba jurisprudence. These theories are the imperial, Roman-Empire, Ancestral, Ebi, and Iwa theories. The chapter realises that each of these theories is laden with certain defects and as such could not be capable on its own to capture the totality of Yoruba political philosophy. What the chapter has done is to highlight the significant elements of these theories for a working out of the nature of Yoruba jurisprudence.

In the end, the chapter considers four basic contentions to be the substance of Yoruba jurisprudence. These contentions are the view that Yoruba jurisprudence is (1) basically a reconciliatory and a restorative jurisprudence; (2) the contention that laws are codes of general principles, not of details, for the general guidance of society; (3) the contention that law is a reflection or an expression of the life-force, the inner self or the soul of a shared, communal or public union; and (4) the contention that laws are recognised as constituting an operational normative system embodied in unwritten but widely accepted usages and practices in forms of covenants and customs or its modern version popularly called customary law.[189]

[189] According to Mann, customary law was regarded by Europeans as immutable tradition, evolving out of the interplay between African societies and European colonialism. But the significant thing is that what is today called customary law is had its foundation in what Europeans or the colonialists called tradition. See Mann and Roberts, *op. cit.*, p. 6.

It is observed that each of these contentions is not without some objections. The chapter attempts to address some of these possible objections, contending as it were, that African (Yoruba) jurisprudence is not immune from its defects but that it is nevertheless a substantive part of jurisprudence. It is believed that the very unclear aspects of the jurisprudence can be the subject of further studies and research. What was critical to the chapter is the fact that thoughts emanating from the west have been enervating factors in the canonisation and continuing innovations on the nature of African jurisprudence.

The significance of the treatments in this chapter consists in the fact that it provides the platform through which positivists' separability thesis in mainstream jurisprudence, that is, the view that law and morality are conceptually separable, will be critically discussed in relation to African jurisprudence, from the Yoruba perspective. The question the chapter poses for treatment in the next chapter then is this, what is the relation between law and morality in the light of Yoruba (African) jurisprudence? Does Yoruba (African) jurisprudence endorse the separability thesis or the inseparability thesis?

CHAPTER FOUR:
AFRICAN JURISPRUDENCE AND THE SEPARABILITY THESIS

4.1 INTRODUCTION

The substantive issue to be investigated in this chapter derives from two significant points of interest: the first is the nature and conception of African jurisprudence analysed in the preceding chapter; the second relates to and borders on the fourth question raised in connection with the significance of Yoruba (African) jurisprudence in the light of existing problems in general jurisprudence. In precise terms, this chapter is interested in interrogating the importance of Yoruba (African) jurisprudence project in understanding the problem of the relation between law and morality as reflected in legal philosophy.

This chapter will argue that, given the reconciliatory and restorative nature of law in Yoruba land, Yoruba jurisprudence endorses an inseparable connection between law and morality. To this end, what this chapter is set to argue is that although the separability thesis as advocated by legal positivists may embody some likeness to truth in the conceptual sense and in the context in which it is presented, (noting, however, the several severe problems that it faces), it is considerably weak and without both conceptual and empirical support in African jurisprudence, as instantiated in the Yoruba context.

It is argued that a careful assessment of the components and features of Yoruba jurisprudence tend to suggest the view that the nature of the relation between law and morality reflects a conceptually complementary one. It is further argued in this chapter that this kind of complementarity between law and morality suggests that law and morality may be considered as different concepts but that both are

complementary which ensures their inseparability. In other words, it posits that differences may not necessarily connote separability.

It is within the ambience of this distinctive attribute of Yoruba jurisprudence as advanced by the proponents of the African jurisprudence debate that this research work hopes to establish the import and significance of Yoruba jurisprudence on the idea of the relation between law and morality. However, since no idea stands on its own completely, a quick review of the varying positions which share essentially but deflects from the conceptual complementarity position, as articulated and argued here, is necessary.

4.2 LAW AND MORALITY IN AFRICAN JURISPRUDENCE: STATE OF ANALYSIS

A quick review of literatures on the African jurisprudence project will show the paucity of interests and reflections on the relation between law and morality. One work of evidential importance in projecting the nature of African jurisprudence is that of Teslim Elias.[1] The basis of Elias' work rests on three basic convictions: (1) that African law is "an hitherto uncharted field of general legal theory";[2] (2) African theory of law can be seen in the light of the "wider framework of general jurisprudence";[3] and (3) the need to have "a change of attitude" and "heart on the part of western scholars and jurists towards the indigenous laws and customs of Africa."[4]

In the light of these remarks, the basic question underlying Elias' effort consists in the following: what are the basic concepts underlying African law?[5] The intellectual possibilities inherent in this question must have been the basic nutrients on which Elias' general thesis was formed. According to Elias, the general thesis of his work consists in the view that "African law, when once its essential characteristics are

[1] See T. O. Elias, *The Nature of African Customary Law*, Manchester: Manchester University Press, 1956.
[2] Elias, *The Nature of African Customary Law*, p. 4.
[3] Elias, *The Nature of African Customary Law*, p. v.
[4] Elias, *The Nature of African Customary Law*, p. 4

fully appreciated, forms part and parcel of law in general."[6] Furthermore, Elias contended that with this general thesis, African legal theory "should no longer be set in opposition to what is frequently but loosely termed 'European law', and this notwithstanding a number of admitted differences of content and of method."[7]

In the light of these, Elias identified some of the common errors associated with the representation and canonisation of African legal theory in general jurisprudence. Termed schools of thoughts, Elias brands them as connoting certain errors which are: the errors of the missionaries, the errors of the administrative officer, the errors of the anthropologist and the errors of the judicial officer.[8] For the purpose of convenience, these errors can be termed the religious, the political, the anthropological and the juridical (philosophical) or jurisprudential.

The error of the missionaries on African law consists in the view that "African law and custom are detestable aspects of paganism which needs to be wiped out in the name of Christian civilisation". For Elias, this conception sees African culture, which is, it is believed the ground out of which ideas of law have necessarily grown as "an undifferentiated mass of custom, rituals and inhuman practices that ought to be abolished *holus bolus*."[9]

The second error starts from the premise that African idea on law is basically an all criminal affair and that because certain criminal offences are recognised and punished by English law in ways often different from those of African law, the two systems are necessarily poles apart in all other respects. The third error is summed up in the words of R. T. Paget[10] who contended, in a prejudicial anthropological

---

[5] Elias, *The Nature of African Customary Law*, p. v.
[6] Elias, *The Nature of African Customary Law*, p. v.
[7] Elias, *The Nature of African Customary Law*, p. v.
[8] Elias, *The Nature of African Customary Law*, pp.25-36
[9] Elias, *The Nature of African Customary Law*, 25.
[10] R. T. Paget, *The Observer*, July 8, 1951 (quoted in Elias, 1956).

conclusion without a basis, that African law lacks a substantial aspect of logic. In his words, "thought in tribal society is governed not by logic but by fetish. To the tribe, trial by fetish is just and trial by reason is unjust."

Paget's conclusion on the nature of African law has resulted into two opposing but nevertheless unwarranted positions on the anthropological groundwork of African law: the older generation of anthropologists and the modern generation of anthropologists.[11] The former sees African law in the light of Anglo-Saxon legal concepts, from which perspective it concludes that there is little or no law in African societies, and thus emphasising that custom, rather than law, is king, in Africa. This conclusion is based on the notion that, for Africans, everything is custom. This conclusion falsely implies that Africans are incapable of differentiating law from rules of social conduct and customs.[12]

The latter group of modern anthropologists are of the conclusion that there is African law but that there are understandable differences between some of its provenances and those of the other types of law, differences that are rooted in the social, political and economic environments in which such systems of law have had to operate.[13]

The last common error identified by Elias in his work is that of the pronouncement of judicial officers in the colonial realm dispensing justice and faced with the duty of applying both African customary law and the laws enforced and enacted by the colonial authorities. The sum of this error according to Elias on African law centres on what he styles "the self contradiction of the opinions of jurists and

[11] Elias, *The Nature of African Customary Law*, pp. 29-30.
[12] This anthropological position on African law is represented in the thoughts of scholars such as S. Hartland, *Primitive Law*, London: Methuen,1924; L. H. Morgan, *Ancient Society*, London: Macmillan, 1877; L. T. Hobhouse, *The History of Social Development*, London: George Allen and Unwin, 1924 Etc.
[13] This anthropological position on African law is represented in the opinions of scholars such as Schapera, I. *A Handbook of Tswana Law and Custom*, London: Frank Cass Publishers, 1970; Meek, C. K. *Law and Authority in a Nigerian Tribe*, London: Oxford University Press, 1937 Etc.

judicial officers in Africa over the nature of African law."[14] One dazzling example, according to Elias, is that of C. C. Roberts. In one instance, Roberts derided African law in view of his perception of the incomparability of African and European laws. In his words

> *In the first place, European conceptions of law and justice have to be discarded; they have nothing in common with African cultures; they are alien in growth and sentiment, and cannot be used to explain the basis of primitive legal theory...*[15]

However, in another instance, Roberts reneged on his earlier detest for African law. In his conclusion,

> *...that there is a recognised code of law founded on principles of justice is apparent if we examine the native laws affecting murder, adultery, theft, and many others...As to the laws governing inheritance and ownership of children, property or mortgage, we find much resemblance to those in European countries.*[16]

The most interesting philosophical aspects of Elias' analysis and contribution to the field of African jurisprudence can be seen in chapter four of the work. In this chapter, Elias' concern is with a critical understanding of what jurists mean when they talk about the concept of law. Reading through this chapter, one gets the feeling that whether African law is indeed a system of law can be answered and solved if and only if we understand what jurists and sociologists mean by the term 'law'.[17]

On our part, it is our conviction that the promising nature of this direction of thought for African studies and scholarship may appear obvious, but then the freshness of this illumination is dampened by the fact that among legal philosophers and in the field of sociology of law, the nature and definition of law is about the most thorny and troublesome aspect. Yet the whole of legal philosophy seems to be clustered around

[14] Elias, *The Nature of African Customary Law*, p. 36
[15] C. C. Roberts, *Tangled Justice*, p. 63 quoted in Elias, *The Nature of African Customary Law*, pp. 35-36
[16] C. C. Roberts *Tangled Justice*, p. 79
[17] Elias, *The Nature of African Customary Law*, pp. 37-55

this perennial difficulty. A century[18] of ideological and endless debates and arguments on the very nature of law[19] in mainstream jurisprudence amongst jurists and legal philosophers has left jurisprudence spent, such that issues of utmost relevance to societal continuity and progress should undeniably take over. Such debates and controversies, in our view, have only succeeded in projecting participants' respective ideological predilections and inclinations, without any socially fruitful results.

Again, this direction of thought does not enhance the philosophical status of African law in as much as the definition of law in Western jurisprudence has adverse implications on the status of African legal theory. General jurisprudence has been necessarily measured by western jurisprudence such that the definition of law we get from that intellectual list cannot be representative but necessarily reflective of an Eurocentric historiography which defines and determines the past or present in the light of its own history.

Elias, for instance, sees the Austinian imperative theory to be intolerant of the inherent nature of African customary law. Austin's paradigm and model of law cuts off every trace of African customary law. This is because, for Elias, Austin's model of law is neither forward-looking nor concerned with the past. It is only a model concerned

[18] Cf. Robert P. George "What Is Law? A Century of Arguments" First Things, Journal of Religion and Public Life, 112 (April 2001):23-29, www.FirstThings.com

[19] Indeed, arguments on the nature of law in jurisprudence are too numerous to list. The positions of different schools of thought in jurisprudence on the nature of law are often not only irreconcilable but also conflicting. The respective schools of thought are the Positivist, the Naturalist, the Realist, the Pure Theory of Law, the Historical and Anthropological schools of Jurisprudence, the Sociological School of Jurisprudence, the Marxist, the Critical Realist Movement, the Feminist, the Postmodernist etc. One can also add the hitherto uncharted field of African legal theory. Within each of these respective schools, a careful student of jurisprudence can discern diverse opinions and positions. For example, in Positivist jurisprudence one can find the classical legal positivism and normative positivism. And what is more, positivist separability thesis attracts the inclusive thesis and the exclusive thesis with a bit of fundamental differences. Again, within Naturalist jurisprudence can be found diverse traditions such as the Thomist tradition, Fuller's naturalism and a basic restatement by John Finnis. The same holds for Realism where American realism is different from Scandinavian realism. The list of irreconcilable theses on each of these schools of thoughts is endless. It is in the light of these varying positions that the student of jurisprudence can conclude that legal philosophy is replete with both ideological and idle arguments on the nature of law.

with what law is now.[20] Besides, for Elias, Austin's analytic positivism is unwarrantedly hostile to African law in as much as it banishes as improper subject matter of jurisprudence discussions on customs and, more importantly, rejects a consideration of ethical matters in law.[21]

With a critical examination of juristic and sociological theories of law such as Austin's analytical positivism, Leon Duguit's social solidarity principle, Savigny's historical school of jurisprudence, and other theories in the sociological school of jurisprudence, and not having a resting place for the proposed African theory of law within the framework of western jurisprudence, Elias cautiously attempts a definition of law, which, in his opinion, can be found accommodating to the content and substance of African law. Admittedly, Elias' construction is borne out of the unsatisfactory nature of most legal models in general jurisprudence. In his words, "it is, therefore, with trepidation that one ventures to suggest this definition: the law of a given community is the body of rules which are recognised as obligatory by its members."[22]

Certain features can be discerned from Elias' definition of law. According to Elias' definition, in the first instance, law can be seen as rules or specific set of regulations. Such regulations or rules are binding on the members of that community. It therefore means that they are obligatory. This is the second feature of Elias' definition. But then what supplies the normative force or bindingness of such rules on the members of the community in question? For Elias, it is the members of that community where those rules are accepted or given recognition. In another sense, it also shows another quality of law which is that of its acceptability. A rule, which is

[20] Elias, *The Nature of African Customary Law*, pp. 37-39
[21] Elias, *The Nature of African Customary Law*, pp. 37-39
[22] Elias, *The Nature of African Customary Law*, p. 55

unacceptable by a given community, cannot be obligatory for the members of that community.

Worthy of note, also, is the view that a law, from Elias' definition, is relative. Thus relativism, for Elias, is a significant attribute of law. This is derived from the fact that if a body of rules is not recognised or acceptable by members of a given community, then it becomes a useless piece of legislation. The meaning one gets from this definition is the view that laws are not known by their translatability into other contexts, languages or cultures, for examples. Every community thus stands unique in its poise towards constructing its own legal framework.

Elias' definition also sets forth a thesis of lasting and enduring importance not only to legal philosophy but also social and political philosophy. This is the endless controversy between the individualists and the communitarians over which is primary and of social significance: the individual or the community? If every member of a community concurs with a body of rules but such body of rules is declined to by an individual member of that community, for some reasons which are enough to attract attention, which has utmost primacy: that which is declined to by an individual or what the community is obliged to? This poser is very crucial not just to social and political philosophy but also for the emerging conceptions of the nature and substance of African jurisprudence of which Elias' work is a leading, pioneering attempt.

However, a critical appraisal and examination of Elias' piece is not out of place here. The worth of any philosophical legal theory is not only in the discovery of new ideas and facts but also in its ability to extend our understanding of general jurisprudence and its ramified problems in the light of the discovered facts and ideas. The novelty of Elias' work cannot be doubted especially in the championing of African legal theory. However, some aspects need to be questioned.

In an important sense, Elias' definition of law is ideologically and culturally unhelpful. Besides that, it is inconsistent with his general conclusion on the nature of African customary law. Worryingly, no where is the distinctive, catchy nature of African law set forth in the work other than a mere and extensive collection and itemisation of the facts and detailed analysis of its content and more importantly, its attributes in the light of western comparison.

The relativity that Elias accommodates in his legal formula is a thing for both the African and Western mind to rejoice over even though he had earlier argued that "European and African readers may be made to appreciate the relativity of the social values which underlie all systems of law, and by which the genius of every people has always designed rules for the regulation of social behaviour in the community."[23]

Besides, conspicuously missing in Elias' analysis is the position of African customary law with respect to the separability thesis i.e. whether law and morality are contingently or necessarily connected given the African worldview and conceptual framework or thinking. Indisputable is the fact that whereas Hart sees the enigma of general jurisprudence to lie critically in the resolution of the problem of the connection between law and morality and some other issues, Elias' concern seems to be centred on the discovery of the criteria by which the boundary of law is to be drawn. Definitely, some thing seems to be missing along the line. Trenchantly, Elias' work seems not to see the relation between law and morality as important in the way in which modern, general jurisprudence perceives it.

Truly, Elias hinted at the fact 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. For example, Elias contended that 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."[24] 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. 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."[25]

For our concern here, it seems to us clear that Elias' jurisprudential agenda of re-assessment of legal problems does not include the idea of the separability thesis. In fact, the problem that Elias devoted his attention to had to do with "the thorny problem of the definition of law"[26], not the relation between law and morality. And yet the dispute over the relation between law and morality in general jurisprudence has grave and great implications for the African continent. This is so in the light of the fact that the continent of Africa, it is often claimed, presents the picture of a vast land with plurality of cultures, moral values and ethno-religious differences.[27] However, his whole discussion about the nature of African customary law or legal theory for short did not capture the salience of the separability thesis.

One could however retort, in defence of Elias, that the rationale behind the absence of the separability thesis in Elias' recognition and treatment could possibly lie in the fact that, in the first place, the controversy over the relation between law and morality had not been given prominence in the field of legal philosophy or secondly, that even if it was so, it was conceived as a pseudo-problem or possibly, in the final

---

[23] Elias, *The Nature of African Customary Law*, p. 5
[24] Elias, *The Nature of African Customary Law*, p. 6.
[25] Elias, *The Nature of African Customary Law*, p. 6.
[26] Elias, *The Nature of African Customary Law*, p. 6.
[27] This fact is so important to the works of Taiwo and Oladosu such that their general framework for the resolution of any legal problem in Africa must take care of this all-important fact. See Olufemi Taiwo, "Legal Positivism and the African Legal Tradition: A Reply" in *International Philosophical Quarterly*, Vol. xxv, No. 2, Issue No 98, June 1985; Oladosu, A. O. "Choosing a Legal Theory on Moral Grounds: An African Case for Legal Positivism," *West Africa Review*, Vol. 2, No. 2 (2001) [http://westafricareview.com]

sense, that it was not conceived as a problem for African legal theory and as such was uncalled for or unnecessary.

The validity of the argument that the relation between law and morality might not have been conceived as a problem for African legal theory and possibly explains why Elias' work was not concerned with it cannot be wished away. But then, we must understand that it is indeed a problem for African law simply because in it lies much of the taunted messages from the West that African philosophy of society is lacking not only in a thorough understanding of the dynamics of law but also in the ability to distinguish between customs, rules and other forms of social regulative mechanism which are not properly speaking laws or legal rules. If the understanding of the connection between law and morality is not a problem then it appears obvious to us that there may be a form of intellectual indigestion in relation to the idea of African law. It is indeed a problem because it explains a lot about the nature of African jurisprudential programme. A critical silence about this vital subject matter of jurisprudence is not enough to explain away its importance for any jurisprudence project for that matter.

In the same vein, the relation between law and morality is not a pseudo-problem whether in African law or in Western jurisprudence. The ideological pretensions behind the series of arguments and controversies may appear bogus but the relation itself is of serious consequences for every human society. The seriousness of the relation and its importance for societal progress is what Patrick Devlin describes as a community of shared ideas on politics, morals and ethics without which society cannot exist.[28] Incidentally, Elias' work was written about the same time when Professors Hart and Fuller were engaged in the popular exchange on the relation

[28] See Patrick Devlin, "Morals and the Criminal Law" in Dworkin, R.M. (ed.) *Oxford Readings in Philosophy. Philosophy of Law*, Oxford: Oxford University Press, 1977, p. 74.

between law and morality. Even though Elias' opinion was formed about two years before this celebrated exchange, it is in obvious terms that one can declare that the very heart of that celebrated exchange must have been formed prior to the date that the exchange was actually published. It is in this respect that this research attempts a critical outline and description of the relation between law and morality in the light of the substance of African jurisprudence.

Another work of evidential importance is that of Elegido. Elegido's work and treatment of the idea of African indigenous conception of law is revealing. This is so in as much as it clearly articulates the general definitional analysis of the contents and substance of what Africans hold as their legal theory. In the first instance, the work contains pieces of interesting arguments to show the poverty of reasoning in the West in the denial of African system of law. According to Elegido, even if the discussion were confined to larger indigenous African societies, some writers would still contend that these societies had no law. These writers have offered three main arguments to support their contention...None of these three arguments is convincing.[29]

In a positive light, Elegido identified the following as common traits of the systems of African traditional law: emphasis on conciliation and compromise; emphasis on general principles; group responsibility and frequent use of informal enforcement procedures. In very strong conclusive words, the differences between notions of law in African legal systems and in the conception of other people outside the continent are superficial.[30]

However, as much as the works and analysis of Elegido seems enlightening, its impotence can be rendered in terms of the view that it did not articulate the importance of African indigenous conception of law not just as an object of study or as

[29] J. M. Elegido, *Jurisprudence*, Ibadan: Spectrum Books Limited, 1994, p. 125.
[30] Ibid., p. 127

a mere existent entity but that even if it were, what the significance of such a project is. In other words, an unbroken analysis of the project of African jurisprudence must stand up to the challenge of demonstrating the significance of the African jurisprudence project in the light of what Max Gluckman calls "the long-standing controversies in modern jurisprudence."[31] This is the bane of Elegido.

Even though it provided some scintillating framework or clues for understanding the thoughts of Africans on the idea of law, it, nevertheless, does not create an intellectual forum for unravelling some of the aching problems in legal philosophy? It is very clear that Elegido's work, in this instance, does not seem to provide answers to pertinent issues in jurisprudence such as the relation between law and morality.

Of scholarly interests to students of African jurisprudence is the work of Professor A. M. Dlamini in an article entitled "African Legal Philosophy: A Southern African View." According to this paper, African legal philosophy is rooted in the theories that Africans had about "organisation, government and law."[32] In his words,

> *The existence of an African philosophy of law does not necessarily depend on such thinking, or reasoning having been written down. The fact is that writing would have assisted in its articulation and accessibility...African legal philosophy does not differ in substance from European legal philosophy. It is only a matter of degree.*[33]

In trenchant terms, three distinctive parts of the African jurisprudence project received quite an articulate and lucid analysis in the thoughts of Dlamini. These parts relates to the factors responsible for the ignorance about African laws, the complete denial of African legal philosophy and the general character of African legal philosophy.

---

[31] Max Gluckman, *Order and Rebellion in Tribal Africa*, London: Cohen and West, 1963, p. 180.
[32] AM Dlamini "African Legal Philosophy: A Southern African View" in *Journal for Juridical Science*, Vol. 22 (2), p. 81.
[33] Ibid., p. 81.

For Dlamini, reasons for ignorance about African legal theory can be attributed to the prevalence of western missionaries in the field of education in Africa, the aping of western mentors, the lack of political consciousness on the part of Africans and the absence of the ability to read and write in traditional African societies and groups.[34]

The second part consisted of arguments to show the absurdity of the claim that Africans had no law. For Dlamini, the insistence of the critics of the existence of African legal philosophy in stating that Africans knew nothing of the intricacies of law but only gave heed to varied systems of customs missed the point. For Dlamini, "except for the differences in the social environment, laws knows no differences of race or tribe as it exists primarily for the settlement of disputes, and the maintenance of peace and order in all societies."[35]

Apart from the fact that Dlamini's work represents a classical apologetic contribution to the idea of African legal philosophy, consciously and conspicuously missing are concrete discussions on the salience of African legal philosophy on the idea of the relation between law and morality. Even when Dlamini discusses the distinctive character of African legal philosophy, these discussions were marshalled towards rescuing the African jurisprudence project from the misconstruction of Eurocentric projections which has often ended up defining the past and the present by its own peculiar historiographic constructions. To further the work of scholars such as Dlamini, an attempt is needed to construct and establish the salience of African jurisprudence in the light of recurrent and persistent problems in mainstream jurisprudence.

However, of pertinence is the view that the relation between law and morality has not been given the intellectual attention it deserves in African legal theory or philosophy. In most cases, discussions on the nature of jurisprudence in Africa are

[34] Ibid., pp. 70-72.
[35] Ibid., pp.72-73

either devoted to denying the existence of any jurisprudential reflection,[36] ascribing an uncertain nature to it[37] or interpreting the substance of what is thought as African legal theory in the light of existing theories in western jurisprudence.[38] At best, those who are persuaded about the reality of law in Africa have, for most of the times, been concerned with a making-a-case kind of exercise on the nature of African jurisprudence.[39] Much attention has not been devoted to a painstaking analysis of the contribution of African conceptions of law or legal philosophy to the field of general jurisprudence.

4.3 LAW AND MORALITY IN AFRICAN JURISPRUDENCE: SOME EXISTING POSITIONS

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,[40] Adewoye[41] and Okafor[42] who have

[36] J. F. Holleman, *Issues in African Law*, The Hague: Mouton and Co., 1974; Driberg, J. G. "The African Conception of Law" in *Journal of Comparative Legislation and International Law*, 230, 1934, pp. 237-238.
[37] M'Baye K. "The African Conception of Law" in *The Legal Systems of the World and their Common Comparison and Unification*, International Association of Legal Science Vol. II, 1975.
[37] M. G. Smith, *The Sociological Framework of Law*, Chapter 2, Kuper and Kuper, 1965.
[38] F. U. Okafor, "Legal Positivism and the African Legal Tradition" in *International Philosophical Quarterly*, Vol. xxiv, No. 2, Issue No 94, June 1984; Olufemi Taiwo, "Legal Positivism and the African Legal Tradition: A Reply" in *International Philosophical Quarterly*, Vol. xxv, No. 2, Issue No 98, June 1985; Nwakeze, P. C. "A Critique of Olufemi Taiwo's Criticism of Legal Positivism and African Legal Tradition" *International Philosophical Quarterly*, Vol. Xxvii, No. 1, Issue 105, (March 1987); Oladosu, A. O. "Choosing a Legal Theory on Moral Grounds: An African Case for Legal Positivism," *West Africa Review*, Vol. 2, No. 2 (2001) [http://westafricareview.com]
[39] See for instances, Elias, T. The Nature of African Customary Law, Manchester, 1962; Allot, A. Essays in African Law, London, 1960; Gluckman, M. (ed.) Ideas and Procedures in African Customary Law, Oxford, 1969; Gluckman, M. Judicial Process Among the Barotse, Manchester, 1967; Gluckman, M. Order and Rebellion in Tribal Africa, London: Cohen and West, 1963; Gluckman, M. *Politics, Law and Ritual in Tribal Society*, 1977; Gulliver, A. G. *Social Control In An African Society*, London, 1963; Dlamini, M. A. "African Legal Philosophy: A Southern African View" in *Journal for Juridical Science"* 22(2): 69-8, 1997; Nwakeze, P. C. "A Critique of Olufemi Taiwo's Criticism of Legal Positivism and African Legal Tradition" *International Philosophical Quarterly*, Vol. Xxvii, No. 1, Issue 105, (March 1987), pp. 101-105; Okafor, F. U. "Legal Positivism and the African Legal Tradition" *International Philosophical Quarterly*, Vol. Xxiv, No. 2, Issue 94 (June 1984), pp. 157-164; Oladosu, A. O. "Choosing a Legal Theory on Moral Grounds: An African Case for Legal Positivism," *West Africa Review*, Vol. 2, No. 2 (2001) [http://westafricareview.com]
[40] Max Gluckman, *Order and Rebellion in Tribal Africa* chp. 7, London: Cohen and West, 1963
[41] Adewoye Omoniyi, "Proverbs as Vehicle of Juristic Thought Among the Yoruba" in *Obafemi Awolowo University Law Journal*, January & July 1987.
[42] F. U. Okafor, "Legal Positivism and the African Legal Tradition" in *International Philosophical Quarterly*, No. 2, Issue No. 94, June 1984.

in one way or the other hinted at or touched on the idea of law and morality in African law. Despite the fact that, in the words of Onwuejeogwu, "African law remains largely untouched,"[43] 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.

However, what needs to be ascertained, at least if we construe the subject matter as they have postulated, is to show the further possibilities open to the terrain of African jurisprudence in this all-important subject matter and controversy of general jurisprudence. The basis for this extension consists in the fact even though their analyses have their merit; theirs is not the total or complete truth. Besides, their analyses have been done in very scanty, less deserving ways. Their treatments of this important problem in general jurisprudence have been essentially perfunctory.

Besides, it is believed that the ways they have hinted about the idea have not been philosophically satisfying simply because either what they ascribe to the relation between law and morality are borne out of discussions that have no relevance with the two concepts, in which case it cannot be comprehensive, or that such treatments have not been philosophically satisfying in as much as such treatments are not derived essentially from a given, established theory of African law that is distinct and clear. In the final analysis, their slight mention of the subject matter did not really say whether the relationship is one of necessity or contingency. The question is: what substantive theory or conception of African law generates the relation between law and morality as discussed by Adewoye, Gluckman and Okafor?

[43] Onwuejeogwu, M. A. *The Social Anthropology of Africa*, Ibadan: Heinemann Educational Books , 1992, p. 116.

4.3.1 MAX GLUCKMAN, AFRICAN JURISPRUDENCE AND THE RELATION BETWEEN LAW AND MORALITY

One of the early treatments of the nature of African law 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, no doubt, is commendable. In the first place, law among the Barotse is sourced in customs, judicial precedents, legislation, equity, the laws of natural morality and of nations, and good morals and public policy. Another source, quite different from constant emphasis in jurisprudential writing, is what Gluckman calls "natural necessities" which is the laws or regularities operating in the environment and in human beings and criminals.[44]

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 man, 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 Lozi people. But then to emphasise what is meant, Gluckman added that such natural morality refers to good morals. An interrogation of Barotse jurisprudence shows a clear instance of a legal and philosophical system which is built around ideals of morality and justice. It can thus be deduced that Barotse

[44] Gluckman, M. *Judicial Process among the Barotse*, Manchester: Manchester University Press, 1967, p. 231.

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 foundation of law. From this perspective, one may reasonably argue that law is not separable from morality.

In a further sense, also, 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 evaluativeness 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.*[45]

[45] Max Gluckman, *Order and Rebellion in Tribal Africa* chp. 7, London: Cohen and West, 1963, p. 198.

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. There is the strive towards the attainment and achievement of justice when law is applied, and/or enacted. The principle of equation involved here is aspiratory in nature. The principles of law and the demands of justice need not necessarily mean the same things. Their functioning is tailored towards the common good.

Thus, there is always a push towards the end of law which is defined to be the achievement of justice. The principles and certainty of laws consist of what is, perhaps, written such 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; 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. 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 implausibility. The implausibility is 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. 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.*[46]

Since morality is eminently infused into the nature of Baroste jurisprudence and the legal system in particular, it behoves us to establish the nature of morality and its place in the nature of the law of Loziland. 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 Barotse jurisprudence. In the words of Gluckman, 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.[47] 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)."[48] In this kind of jurisprudential framework, what then is the place of morality?

[46] Ibid., p. 234.
[47] Ibid., p. 259.
[48] Ibid., pp. 325-326.

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 in Lozi land. Apart from this, morality provides a bridge to cover the gap between the law and the evidence of the facts of a case on ground. To this end, it is like a bridge between facts and the law. 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 is regulated by moral criteria. In other words, the application of a legal rule to a case in hand is based on moral discretion of the judges. The third role refers to conscience raising i.e. morality is one of the basis of Lozi people's awareness of the limit and regulation of the law. This refers to the fact that morality, as 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.[49]

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 way round: 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; for Lozi jurisprudence, laws do not just have a moral content, but 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. 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.

[49] Ibid., p. 259.

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.

The conclusion is that, going by 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. The Social and Values theses are crudely negated when interpreted in the light of Barotse jurisprudence. In this negative sense, the separability thesis, for Barotse jurisprudence is not only implausible, but also impossible.

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 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. This 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 being law only in name but not one in concept and 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."[50] 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 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 "trans-cendent" about either its methods or its results. It 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."[51] In the words of Nicholas Kasirer, cross

[50] Freeman, M.D.A. *op. cit.*, p. 793.
[51] 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.

cultural jurisprudence it "involves stepping out of "Law's empire" (if only temporarily) and attempting to find some footing in "Law's cosmos".[52]

4.3.2 F. U. OKAFOR, AFRICAN JURISPRUDENCE AND THE RELATION BETWEEN LAW AND MORALITY

Fidel 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, therefore, 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, 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 are 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.*[53]

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,

[52] Nicholas Kasirer, "Bijuralism in Law's Empire and in Law's Cosmos" (2002) 52 J. Legal Educ. 29.
[53] Okafor, F. U. *Igbo Philosophy of Law*, Enugu: Fourth Dimension, 1992, pp. 90-91.

> *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 - in fore interno. 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.*[54]

The most glaring aspect of the unsuitability of legal positivism in relation to African 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 and morality stand as a challenge to legal positivism."[55] 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.*[56]

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*

[54] Okafor, F. U. *Igbo Philosophy of Law*, Enugu: Fourth Dimension, 1992, pp. 91-92
[55] Okafor, F. U. *Igbo Philosophy of Law*, Enugu: Fourth Dimension, 1992, p. 90.
[56] Ibid., p. 91.

> *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".*[57]

According to Okafor, only a law with an ontological foundation would be a law of the people for the people.[58] The ontological foundation of African law is discernible in its moral foundation. In his 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.*[59]

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. 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 such enforceable norms formally enacted or established by the appropriate official political organ.[60] 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. Bentham and

[57] Ibid., p. 90.
[58] F. U. Okafor, "Legal Positivism and the African Legal Tradition" in *International Philosophical Quarterly*, No. 2, Issue No. 94, June 1984, p. 163.
[59] F. U. Okafor, "Legal Positivism and the African Legal Tradition" in *International Philosophical Quarterly*, No. 2, Issue No. 94, June 1984, p. 163.
[60] Okafor, F. U. *Igbo Philosophy of Law*, Enugu: Fourth Dimension, 1992, p. 90.

Austin's separability theses are anchored on the idea of sovereignty and the limitations that those conceptions drew have, in some interesting respects, been transcended by modern discussions of legal positivism. To have limited his analysis of legal positivism 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 have been better understandable if he had defined the nature of the version of legal positivism that he was challenging to have established the justification for such treatment.

This is especially so in view of the fact that Okafor's *Igbo Philosophy of Law*[61] was written at a time that 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. According to Hart, it is possible to reject Austin's brand of legal positivism without vitiating the veracity and validity of the separability thesis.

4.3.3 OMONIYI ADEWOYE, AFRICAN JURISPRUDENCE AND THE RELATION BETWEEN LAW AND MORALITY

Omoniyi Adewoye has provided a perspicuous analysis on the nature of Yoruba jurisprudence, particularly in relation to the connection between law and morality. But then, on a critical note, his treatment of the relation between law and morality is neither substantial nor specific; it is only a tangential rather than a direct focus.

[61] 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.

Unlike Okafor's clear-cut, focussed and insightful attack on the positivists' thesis on the relation between law and morality in the light of Igbo jurisprudence, what can be credited to Adewoye on Yoruba disquisition on the relation between law and morality is 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."[62] 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.

In the first place, 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.

[62] Adewoye Omoniyi, op. cit., p. 3.

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.

In the second place, 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, 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 an un-entertain-able subject matter 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.

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 to be. And what is more, it appears the kind of jurisprudence that Adewoye had in mind is that which is depicted in the philosophical utility of proverbs. This 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 scientificity 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.[63]

The scientificity 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 form proverbs, many other indices and expressions of Yoruba social and cultural life are significant in pointing out the nature of their jurisprudence.

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

As clarified by Sobande, three points of wisdom were the constituents of both traditional and even 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*. *Ase* is the reflection of the king's command or the directives of the government which are believed to be unbreakable. These points of wisdom are either formally or informally portrayed in practices and actions that are commonplace in the society.[64]

The idea of law in Yoruba society is displayed and portrayed in cultural festivals and social dances. In the area of marriage, for instance, there are distinct dancing steps and songs that are performed during such a gathering that tell of the kind of laws enjoined in that locality or even in the town at large. Those laws and taboos are pronounced in songs and chanting. The essence of the chanting is to acquaint the people with laws that are operative within the social institution called marriage. The same can be said of cultural festivals.

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.[65]

The idea of *Owe*, i.e. collective or communal help, is on the one hand a social concept, but on the other it is essentially an agricultural engagement. *Owe* also speaks of the existence of laws among the Yoruba people. These laws are defined into

[64] Sobande, A. "Eewo" in Oludare Olajubu, ed., *Iwe Asa Ibile Yoruba* Ikeja: Longman Nigeria, 1978, p. 23.
[65] Idowu, W. "African Philosophy of Law: Transcending the Boundaries between Myth and Reality" in *Africa: Myth and Realities, Enter-text Journal*, pp. 52-93.

existence when citizens of a township engage themselves in the practice of *Oowe*. As a social practice, though, the laws that define the relationship are not meant to be broken or set aside. They are necessary for the uplifting of social equilibrium among members of that same community. These outlined cases of social practices speak of the idea of law as exemplified in Yoruba communal life.

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. What is begging for analysis as part of Yoruba jurisprudence is a total and comprehensive picture of the nature of law in Yoruba philosophy.

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 relation between law and morality, 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 each of 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 derived their validity from the moral milieu that pervades the operation of law.

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, an ontology, as he claims, with a moral foundation. On his part, Gluckman constate 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.

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. 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. In our view, an endorsement of conceptual complementarism 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. The possibility of this position in African jurisprudence is what we intend to construct.

4.3.4 SOME OTHER CONCEPTUAL POSSIBILITIES

Apart from the general discussion on the relation between law and morality presented as part of the agenda of African jurisprudence by Gluckman, Adewoye and Okafor, an incisive reading and interpretation of African cultural and political thought tends to reveal the possibility of other conceptual models. Such conceptually possible models open to the terrain of African jurisprudence can be understood to represent the thesis of epiphenomenalism, the derivative thesis, the assimilationist thesis, the accommodationist thesis, the culturalist thesis and the thesis of conceptual complementarism.

This chapter argues that the thesis of a conceptual complementary relationship, as opposed to a thesis of conceptual separability as advanced by legal

positivists in western jurisprudence, is more compatible with African jurisprudence and in precise terms, Yoruba jurisprudence. It is equally contended that an adequate picture of a legal system reflects more of the conceptual complementary nature of the relationship between law and morality rather than one of conceptual separability. It is in fact argued that, law and morality, if seen from the perspective of conceptual complementariness, cannot be conceived in separable terms. What then are these conceptually possible and interpretable positions within African jurisprudence?

4.3.4.1 THE THESIS OF EPIPHENOMENALISM

The epiphenomenalist thesis states that law is an epiphenomenon of morality. Legal epiphenomenalism states, therefore, that law is a by-product of morality or the moral milieu in which it originates. In furtherance of this thesis, it is believed that legal epiphenomenalism posits that law has its root and origin essentially in morality. It thus implies that the history of law is tied essentially to the history of morality. Morality thus explains how law came to be and its essence altogether. The meaning is that if this epiphenomenalist thesis is accepted, it then follows that law only makes sense only in the context of a moral framework.

From the above, one is therefore inclined to regard Adewoye's conception of law and morality as an example of the thesis of epiphenomenalism. The importance of this conception lies in the fact that it explains generally the origin of law as sourced in the prevailing moral framework existent in a given society. Thus, the originality of this conception of the relation between law and morality consists in the fact that it pins down the relationship between law and morality in terms of the question of origin. Law can be explained in relationship to morality. But then, the other side could equally be true: morality cannot be explained in terms of law since the by-product, i.e. *epi*, cannot in any way account for the phenomenon.

The soundness of this theory is dampened by the fact that what is ascribed to law, within this epiphenomenalist thesis, is an impotent status. In other words, the epiphenomenalist thesis renders law inactive thus ascribing to morality a primary mode of existence more than law. Also, the bane of the theory consists in the fact that an epiphenomenalist thesis describes the relation between law and morality not in terms of symmetry but in a one-way, causal sense in which the *epi*, in this case law, has nothing to impact causally/generically on the phenomenon. In a way, logical or empirical necessity is denied in the law-morality relationship advocated epiphenomenalism since logical necessity, for instance, requires that the predicate of a necessary statement be contained in the subject or the other way round. Our analysis must then go beyond the epiphenomenalist thesis since epiphenomenalism does not explain nor capture the salience of a necessary connection between law and morality.

4.3.4.2 THE THESIS OF ACCOMODATIONISM

The accommodationist thesis is also a favourite conceptually possible position in African jurisprudence on the relationship between law and morality. The accommodationist thesis states that law is an institutional accommodation of morality. By institutional accommodation is meant an imposition of limit on the scope of shared sameness between what is legal and what is moral. While there is an attraction of law towards the moral merit of a case, there is always an imposition of limit on the extent to which the law can be varied to meet the demands of justice. In all probability, it can be reasoned that Gluckman's model is more in tune or can be branded the accommodationist model. According to Gluckman,

> *The push and pull of Barotse jurisprudence consist 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.[66]

To this end, accommodationism posits that law is only an acceptance of moral values which are necessary to its fulfilment, vitality and most importantly, its social and general acceptability. In other words, the accommodationist model draws a boundary between what is essential to law and what is essential to morality. Thus, the whole of morality is not and never at stake when considering its relation to law. This thesis draws some inspiration from the submission of H.L.A. Hart on the legalisation of morality. According to Hart, "it does not follow that everything to which the moral vetoes of accepted morality attach is of equal importance to society; nor is there the slightest reason for thinking of morality as a seamless web: one which will fall to pieces carrying society with it, unless all its emphatic vetoes are enforced by law."[67]

The problem, sometimes, with accommodationism is the fact that it denies that law has a foundational inspiration from moral values. In other words, a practical assessment of the history of the relationship between law and morality in specific cultures will show the falsity in the assumption and claims of accommodationism. From a keen sense of history, morality has been found connected to the development of law such that law is not just an institutional accommodation of morality but, in these cultures such as the ancient Greek world, and even in the three cultures under examination i.e. Barotse, Igbo and Yoruba cultures, law appears to be founded on the platitudes of morality thus giving it its inherently normative and evaluative character. Thus, it appears obvious to us that the thesis of accommodationism, with respect to the relation of law and morality, is in need of revision. As a matter of fact, the

[66] Max Gluckman, *Order and Rebellion in Tribal Africa* chp. 7, London: Cohen and West, 1963, p. 198.
[67] Hart, "Immorality and Treason" in *Individual and Freedom: Mill's Liberty in Retrospect*, edited by D. Spitz, New York: W. W. Norton and Co., 1971, p. 249.

separability thesis as advanced by legal positivists is likely to remain unaffected by the thesis of accommodationism.

Again, accommodationism suffers a flaw going by the Gluckman example, if indeed it sees morality as not involved in the certainty of law. Gluckman had written about the Barotse example that "judges are compelled to go against their view of the moral merits of cases in order to meet the demand for certainty of law". How is the certainty of law to be defined? Obviously not in a unidirectional manner, since law is not built and founded on law alone. The definition of the certainty of law is multidimensional. One of the dimensions is in its moral dimension. This view is in accord with the controversial but factually plausible or reasonable observation of Lon Fuller that law is not and cannot be built on law alone. If this reasoning is clear, then it becomes a proposition to be accepted that accommodationism is mistaken by excluding morality in the certainty of law.

4.3.4.3 THE THESIS OF CULTURALISM

The thesis of culturalism on law-morality relationship, a conceptual possibility in African jurisprudence, is based on the nature of cultures in each society. Basically, the contention of the culturalist thesis is that law and morality are both cultural phenomena existing and found in all cultures and in most societies. From a cultural point of view, law and morality are part of the growth and development of the culture of a people. What then is culture?

The dictionary defines culture in more than one sense. In an intellectual sense, culture is said to be the "act of developing by education, discipline, social experience; the training or refining of the moral and intellectual faculties."[68] In an anthropological sense, culture refers to the "total pattern of human behaviour and its products

[68] Webster's Third New International Dictionary, 1982.

embodied in thought, speech, action and artefacts, and dependent upon man's capacity for learning and transmitting knowledge to succeeding generations through the use of tools, language and systems of abstract thought."[69] From these definitions, it is clear that a people's culture embraces a lot of things abstract and real, actual and potential, sometimes perceivable or coded in sets of principles for living.

Edward Tylor, the great classical anthropologist, defined culture as all the items in the general life of a people. The highest social value of a given culture is its unity. A holistic construct through which their beliefs and hopes about and experiences of life can be interpreted and understood. A people's culture, therefore, concerns the formation, development and manifestation of the creative essence of man as pictured in that given society. This is often achieved through the regulation of mutual relations of man with nature, society and other peoples.

A simple definition offered by Fleischacker says that culture is a set of practices and beliefs that persists over several generations."[70] If culture is taken to mean, in the simplest of conception, people's way of life, in terms of what they believe and which they practice, one way by which these practices and beliefs are often known is by the kind of laws that permeate that culture. In the same vein, practices of a given society are also known by the kind of moral values which underlie those practices or which gives meaning to them in the first instance. What it translates to mean is that law and morality are expressions of a people's way of life. Thus, from that conception of culture, one can infer that the way of life of a given people is what manifests in their laws and in the moral values they hold. The culture of a given people is what is expressed in their law. In the same way, their culture is what is expressed in the kind of moral values espoused in that society. On both levels of

[69] Webster's Third New International Dictionary, 1982.
[70] Fleischacker, S. *The Ethics of Culture*, Ithaca: Cornell University Press, 1994, p. 71.

analysis and understanding, cultural affinity therefore ties and connects law and morality together.

Since this is so, it behoves us to conclude that the relationship between law and morality is expressible in the fact that both are expressions of the ways of life of a people. A people's way of life is not divided but a single whole. It is often expressible in what their thought pattern is. Their mental possibilities are part of the whole of a culture. Significantly, also, a people's culture refers to the ontological or metaphysical worldview which often gives meaning to the practices and beliefs which encapsulates their culture. The relationship between law and morality, from the cultural perspective, shows that what is legal and what is moral originate directly from the ontological framework which is prevalent within that culture.

One possible problem that this conception of the relation between law and morality will have to resolve borders on the notion of cultural change or shift. Cultural change or shift may be occasioned by many factors. For example, cultural change may occur when prevailing practices and beliefs are dysfunctional to the progress of the societies concerned. Furthermore, cultural change could occur when existing practices and beliefs are discordant with the ethos of a new set of cultural values that a new generation is bent on implementing.

Moreover, cultural change could result from the inevitable facts that existing practices and beliefs are not cohering with other parts of the whole tradition of a people. And what is more, such changes may be on account of a shift in metaphysical worldview, which may be as a result of an imposing, impervious and undaunted religious experience. The list is often times endless. Such cultural change may sometimes be maximal, minimal or average.

The question is: what then would the nature of law and morality be in the case of such cultural changes? For example, colonialism in the world and particularly in Africa represents a very huge cultural imposition on the colonised. It not only affected but equally transformed the cultural worldview of the colonised societies. This kind of experience represents a form of cultural change in Africa such that laws, morals, religion, values etc were suppressed and super-imposed on by the cultural patterns, interest and desires of the colonial masters. Starr and Collier are of the view that law, for example, is a thing constructed by human agency encoding certain power relations.[71]

Granted this postulate, colonialism represented or encoded a kind of power relations between the powerless or subjugated colonised people and the powerful or subjugating colonialists, at least as far as colonial relations were concerned. It is in all probability true that colonialism changed the face of African law. If this be granted, for us the conclusion is that colonialism has not only changed the face of law in the colony but also, by this, changed or could have changed the relationship between law and morality, if we go by this cultural perspective on the relation between law and morality.

In fact, when there are cultural changes in a given society, what is often more likely the case is that just one part of a society's culture may be what is exposed to change. For example, the legal power structure could change without a resulting change in the moral set up or structure. In this case, the influence of the imposing culture would create a kind of bifurcation in the legal structure especially between the indigenous culture and the imposing culture. Since these two structures are created and thus are found 'co-existing', it is difficult to comprehend how it is that

[71] Starr, J. and Jane F. Collier, *History and Power in the Study of Law: New Directions in the legal*

law and morality, given the dialectics of cultural change can be regarded as connected in an important sense.

A different situation can be established when the cultural change in question is often not of an imposition but one of adaptation of an alien culture. This adaptation may become realised through the method of assimilation and the process of ready acceptance. In this kind of situation, what is sometimes required is an allowance of time during which the process of internalisation of the values of the alien culture are adapted. Still, in this kind of social situation, the nature of relation between law and morality assumes another character entirely. That is if the law-morality relationship differs between the two cultures.

Aside from the above, again, one other problem for this conception is the provision of a convincing distinction between, on one hand, law and morality as part of a people's culture and, on the other hand, law and morality as part of the tradition of a people. The reason for this distinction is necessitated by the following pertinent questions: is culture necessarily the same as tradition? If not, what is the distinction? If it is, what connects them? Which is more enduring - culture or tradition? Based on this, can we say law and morality are just part of culture and not tradition or part of tradition and not culture? Or is a culture reflected necessarily in a tradition or vice versa? What could then be the implication of the culture-tradition distinction on the relation between law and morality in African jurisprudence, viewed from the culturalists' perspective?

As argued by Kwame Gyekye, even though it is sometimes difficult to distinguish between culture and tradition, there is a kind of distinction that can be pointed out. And this distinction is very important in the consideration of the

---

Anthropology, Ithaca: Cornell University Press, 1989, pp. 3, 6-9.

tradition-modernity distinction often peddled in characterising African situations and societies and the western, advanced world in general. What then is tradition? What is meant by culture? What is the difference and how does that difference enhance our understanding of law and morality from a cultural perspective?

According to Lord Acton, tradition is a belief or practice transmitted from one generation to another and accepted as authoritative, or deferred to, without argument."[72] In the words of Edward Shils, tradition means "anything which is transmitted or handed down from the past to the present."[73] A somewhat different conception is that offered by Samuel Flesichacker who states that tradition is a set of customs passed down over the generations, and a set of beliefs and values endorsing those customs."[74] If we accept the definitions of culture offered so far in the analysis of the cultural perspective, then we are compelled to go along with Gyekye that, in obvious terms, there is a difference between culture and tradition. According to Gyekye, the distinction consists in the fact that people create cultural values but it is not every cultural value created that ends up in the annals of tradition. The difference is that cultural items require time to be transformed into a tradition in every society.

Given this truth, it shows that both culture and tradition are socially inherited practices and beliefs that profoundly affect our lives, though in the hierarchy of meaning and social priority, a tradition is deeper in meaning than culture. In this case, it shows that if law and morality are regarded as part of culture, it is not impossible that what is culturally true of the relationship between law and morality may not be ascribed the status of tradition. This demonstrates nothing other than their changeability and modifiability. Such modifiability or changeability may be directed

---

[72] Acton, H. B. "Tradition and Some Other Forms of Order" in *Proceedings of the Aristotelian Society*, n.s., vol. 53, 1952/3, p. 2.
[73] Shils, E. *Tradition*, London: Faber and Faber, 1981, p. 12.

just at the nature of law in such society without an effect on morals, for instance, or vice versa. The inability, however, to handle the distinction between culture and tradition weakens the culturalists' thesis on the relationship between law and morality.

4.3.4.4 THE DERIVATIVE THESIS

The derivative thesis is also another possible conception of the relation between law and morality in the canons of African jurisprudence. Looking through the three case studies of the Barotse, Igbo and Yoruba cultural worldview, the derivative thesis takes off from the assumption that the content of law is derivative of certain principles of morality. For example, while explaining the Barotse jurisprudence, Gluckman contended that legal concepts are imbued with ethical imperatives. The exact meaning of that contention indicates that law derives its obligatory status depending on the content of such laws. Such contents, if we understand Gluckman's portrayal of Barotse jurisprudence, make meaning when they are sensitive to morality. Okafor's interpretation is even down to earth. For him, "laws in the Igbo traditional setting must conform to the ethics and morality of the people."[75]

Interestingly, all three authors seem to indicate that, in the cultures under examination, apart from the claim that law and morality are inseparable, i.e. not conceptually separable, laws in general derive their originality and enforceability from the content of such laws. Apart from Adewoye's espousal of the thesis of epiphenomenalism, Yoruba jurisprudence, for him, endorses the derivative thesis as well. This is the view that law derives necessarily from morality. According to him,

> *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*

---

[74] Fleischacker, S. *op. cit.*, p. 45.
[75] Okafor, F. U. *Igbo Philosophy of Law*, p. 90.

from this moral milieu. It is this milieu which also endows law with an authority sufficient to dispense with the mechanics of enforcement.[76]

The excellence of the derivative thesis is, however, dampened by the fact that it only affirms a kind of asymmetrical relationship between law and morality. Law is to be derived from moral principles but then, what morality derives from law is left unanswered. In a nutshell, our argument is that the derivative thesis does not capture the essence of the relationship between law and morality. The derivative thesis contends that law is derived primarily from morality and not vice versa. There appears to be a bit of historical validity in this assertion. Historically, law is derivative of morality. One important implication of this thesis is the view that law is therefore external to morality just as it is true that morality is also external to law.

4.3.4.5 THE THESIS OF ASSIMILATIONISM

The thesis of assimilationism is of the contention that law is an assimilation or incorporation of the features and qualities of morality. The contention of assimilationism is the view that since law assimilates morality, it is sterile arguing whether law and morality are related. The assimilationist thesis, as we understand it, posits that the issue of relation between both concepts is assumed once it is true that law and morality assimilate or incorporate each other or at best that law is an assimilation of morality. Okafor's model can be interpreted in the light of assimilationism in the sense that, for Okafor, law is an assimilation of the features inherent in a given society's ontology which is, for Okafor, a moral foundation. Thus, when law is said to be just as long as it incorporates the ontology of a people, what is stressed and at stake is the view that law is an assimilation of what is ontologically good, which is the morals of a people. Thus, "what is considered ontologically good

[76] Adewoye Omoniyi, op. cit., p. 3.

will therefore be accounted," according to Okafor, "as ethically good; and at length be assessed as juridically just."[77]

Even though the statement of assimilationism appears difficult to understand, in this regard we shall contend that, our tentative understanding of assimilationism with respect to the connection between law and morality is plagued by one obvious point which is the view that this thesis breaks down once it is possible to point out one fundamental area of difference between law and morality. Truly, law may incorporate or assimilate the ideals of morality. Moreover, it is equally possible for law to be regarded as overlapping with the nature of morality. But the thesis cannot go farther than the opinion that law assimilates morality. Besides, the assimilationist thesis may be stranded on the issue of difference if it can be pointed out, for instance, that both concepts possess different semantic or linguistic structures. In the primary sense, it is often pointed out that, going by the structure of language, the language of morality and that of law represent two different fulcrums though both specifically eliciting an aspect of human behaviour. Nowell-Smith argued that the language of morals involves the demand for reasons for the performance of the expected duty whereas the language of law, both in the advanced and crude forms, is silent on the search for reasons but openly canvasses for compliance based on the authority backing it. The authority behind law is that of command or force, not rational authority.

4.3.4.6 THE CONCEPTUAL COMPLEMENTARISM THESIS

As earlier stated, this chapter argues that the thesis of a conceptual complementary relationship, as opposed to a thesis of conceptual separability as advanced by legal positivists in western jurisprudence, is more compatible with African jurisprudence and in precise terms, Yoruba jurisprudence. It is equally

[77] Okafor, F. U. "Legal Positivism and the African Legal Tradition" in *International Philosophical*

contended that an adequate picture of a legal system, in empirically observable terms, reflects more of a conceptual complementary nature of the relationship between law and morality rather than one of conceptual separability. It is in fact argued that, law and morality, if seen from the perspective of the position of conceptual complementariness, cannot be conceived in separable terms.

To this end, what this work tends to suggest, as a tentative thesis, is the view that while the separability thesis as advocated by legal positivists may not be an entirely false system, it is not always the true case with every legal system. As a matter of fact, it is argued that the appeal of the thesis is not forceful in the canons of African jurisprudence. The thesis of this work, therefore, is that African jurisprudence, on the relation between law and morality, endorses a conceptual complementary relation. This conceptual complimentary relationship between law and morality is dialectical in the sense that the view that both may not be logically dependent on each other is made stale and redundant by the fact that neither is complete without the other, despite the claim of conceptual dissimilarity. Even if it is agreed, for the sake of argument, that ostensibly law is different from morality, and morality is different from morality, however, it still does not follow that to be different suggests being separable. To accept the thesis of separation on this ground is to deny the complementarity of both concepts.

In very clearly stated terms, conceptual complementarism as stated and set forth here, however, does not deny that both law and morality, conceptually are different, what is denied is the view that since they are different, then, it is also the case that they are separate or separable. Two or more concepts may be found different or dissimilar. But the fact of dissimilarity between these two or more

---

Quarterly, Vol. xxiv, No. 2, Issue No 94, June 1984, p. 163.

concepts does not necessarily connote separation. As a matter of fact, two concepts that are different or dissimilar may not be subject to separation at all especially when both are complementary. The complementariness does not remove the dissimilarity but may entails inseparability.

The definition of difference, as conceptual complementarism sees it, is only an opportunity for an extensive definition of morality in terms of law and vice versa. This extensive definition of both concepts in terms of each other in the framework of conceptual complementarism consists in the fact that both concepts are necessary accompaniment of each other in a legal system. In other words, one is incomplete in a legal system without the other. It is in this sense that it is suggested that law taken separately makes a legal system or system of philosophy of law incomplete and as such that a system of laws or legal system is necessarily built on some moral standards and also essentially revolves around some moral standards. This necessity, in terms of complementarism, is what is implied when it is said that one is an extension of meaning and intelligibility of the other. A conceptually complementary relationship cannot be defined in terms of the notion of separability. This kind of conceptual complementarism deflects from possible existing positions in African jurisprudence as earlier stated and argued.

The argument of conceptual complementary relationship between law and morality as set forth here takes after the view that law is viewed in terms of the certain metaphysical principles operational within the society concerned, and in most cases, this metaphysical framework affords an independent reason for ascribing a complementary relationship between law and morality. Thus, complementarism, as highlighted so far, explains the connection between law and morality, in an inseparable way to consist in the fact that, law is the enforcement of morality in fact;

morality is the enforcement of law in conscience. This argument can be further buttressed in the light of a critical analysis of Yoruba socio-political and metaphysical philosophy.

In the first place, law and morality tend to be seen in a conceptual complementary kind of relationship. Law and morality are seen, from the African legal philosophical worldview, as complementary to each other, within the respective cultural, metaphysical template existent within the given society. In other words, legality is seen as an offshoot, a natural extension of the moral beliefs and charter of the society in which case both are often found to explain and encapsulate each other.

The conceptually complementary position of such a relation makes it difficult to divorce law and morality from one another. Law is seen as the expression of the moral life of the society while, in this complementarism, morality is a test of law. It is the complementary character and nature of the relationship between law and morality that needs to be accounted for. In other words, both enclose each other or are natural to each other or express one another necessarily in the regulation of affairs of man in the society.

In other words, it appears very strong that the certainty of law includes the moral relevance of that law. By endorsing an accommodationist thesis in regard to the relation between law and morality what is denied by Gluckman is the conceptual complementary relationship between law and morality. What the thesis of conceptual complementarism thus ascribes to the relation between law and morality is the view that law derives its certainty by its foundational moral status. How that certainty or general principle of law is inclusive of morality is what is endorsed when it is said that law and morality express a kind of conceptual complementary relationship.

To ask whether there were any sort of necessary connection between law and morality, or perhaps, if there is any such thing as the inseparability thesis in African legal theory, showing the connection between both, the answer is likely to be this: law is the enforcement of morality in fact; morality is the enforcement of law in conscience. This is the important point of their connection and the utmost too.

Moreover, this kind of conceptual complementarism between law and morality in the African milieu seems to have received some support considering the metaphysical worldview shared by Africans, especially when we consider, for instance, the Yoruba culture. In the general sense, an exploration of the metaphysics of a people is a way of demonstrating what is intelligible to them. This metaphysics not only establishes the basis of intelligibility for them, it also helps us in understanding their theory of meaning, the framework of meaning and the whole structure of thought on which certain basic elements of their life are explainable in general.

This metaphysics cuts across and explains their basic thoughts and beliefs with respect to human nature, human action, human hope and beliefs etc. Often, it is no wonder if this kind of metaphysical outlook and structure are classified as the people's methodologies or ways of knowing (epistemology). It serves as a way of understanding their philosophy. In this kind of outlook it is not a misnomer to state that what is philosophical for them is also methodological. That is why Sodipo, for instance, contended that within this kind of structure and metaphysical outlook, "philosophy is reflective and critical thinking about the concepts and principles we use to organise our experience in law, in morals, in religion, in social and political life, in history, in psychology and in the natural sciences."[78]

In a great deal, this existing pattern of thought and belief system is radically influenced and shaped by the prevalent metaphysical outlook or framework it bears.

The preponderant and prevalent metaphysical outlook and framework in which basic relations, ideas about life, ideas about the afterlife, about human actions, experiences of life in society whether past or present are judged and encoded in a meaningful structure consist in what can be regarded as African traditional thought. In this kind of metaphysical thought system, law is held to be meaningless without the restriction of morality while morality is also expressed in one way or the other through the instrumentality of law. Law bears out the moral life and convictions of the society. The legal is not odious to the moral and the moral explains the legal. To divorce the moral from the legal is like separating the snail from its shell. Considered from this metaphysical bent, the snail-shell simile appears very relevant in explaining the relation between law and morality. The moral foundation of an average African society seems to be the carrier of its laws, in which case it shows the depth of connectedness between the legal and the moral.

Trenchantly, there is a metaphysics that underlies, for example, the Yoruba people's experiences and conception of law and morality. This metaphysics also under girds their several attempts at understanding their history, religion and social and political life in general. In explaining their schema for intelligibility, it is to this metaphysics that the Yoruba people look up to. Cleverly, then, it appears a very sustained and strong view that there is a wall of inseparation between the explanation for every day life and the inherent metaphysics which serves as their structure. In a way, borrowing the Marxist terminology, this cultural metaphysics serves as the structure on which the totality of life and its varied dimensions - the legal, moral, political, social etc. - constitute the superstructure. To this end, it can be postulated that this superstructure is part of the intricate constituents and composition of the cultural metaphysical conception of history endorsed by the Yoruba people.

---

[78] Sodipo, J. O. *Philosophy and Culture, Inaugural Lecture*, Ile-Ife: Ife University Press, 1973, p. 3.

According to R.G. Collingwood, the task of metaphysics in every age consists in the framing, the decomposition and the analytic exposition of the lines and parts of each culture's worldview. That is why Collingwood considers metaphysics to be the historical science that aids us in uncovering the Absolute Presuppositions of each culture in every age and epoch.[79] Indeed, the salience of interrogating the Yoruba metaphysical paradigm in understanding the ideological pretensions and controversy, in legal philosophy, over the separability thesis becomes, a fortiori, of crucial and utmost significance.

Two reasons account for this significance: one, when philosophy was to investigate and interrogate the nature, essence and origin of the universe, it was to metaphysics that it sought for help. In fact, philosophical inquiry was the inquiry of metaphysics. It is in this sense, that Bentham himself considers metaphysics, rooted in experience and reflection, to be the root of all knowledge. In his words, "metaphysics is descended of credible parents, Experience and Reflection. The precise date of her birth, she never could recollect... Nursing mother if not parent of the whole train of sciences, yet disowned by thy children".[80]

Secondly, the whole field of jurisprudence, or legal philosophy simply so called, seems parasitic on metaphysics such that it is not independent on its own. It has no separate problems of its own except that conferred on it by metaphysics, for instance. This is echoed in the observation of Ronald Dworkin. According to Dworkin,

> *The philosophy of law studies philosophical problems raised by the existence and practice of law. It therefore has no central core of philosophical problems distinct to itself, as other branches of philosophy do, but overlaps most of these other branches...the debate about the nature of law, which has*

[79] Collingwood, R. G. *An Essay on Metaphysics*, Oxford: Oxford University Press, 1940, p. 2.

[80] *The Limits of Jurisprudence Defined* edited by Charles Warren Everett, p. 16

dominated legal philosophy for some decades, is, at bottom, a debate within the philosophy of language and metaphysics.[81]

Given the truth of the above, it is also argued that the conceptual complementary character of the relation between law and morality in African legal theory derives from the language of the concept of law itself. This linguistic or semantic economy appears to be a derivative of the prevailing metaphysical worldview alluded to earlier. It appears very strong that the certainty of the concept of law includes the moral relevance of that law. How that certainty or general principle of law is inclusive of morality is what is endorsed when it is said that law and morality express a kind of conceptual complementary relation arising from the idea of law and terms or concepts used in demonstrating it.

For example, when the words used to describe or conceive law in most African political societies are examined critically, such words tend to be implicative of morality too. For example, among the Barotse of Northern Rhodesia as stated by Gluckman, the word *nulao* is used to express the idea of law. But then, among them, it is significant to know that the word *nulao* expresses the idea of other regulatory mechanisms among the Barotse such as morality, laws of nature and even what the Barotse refer to as the laws of God.

In the same vein, juristic thoughts, as argued by Adewoye, among the Yoruba people can be discerned in their use of proverbs. There are proverbs among the Yoruba people that are of jurisprudential value particularly on the subject of law and morality. For example, among the Yoruba people it is often said that *ilu ti ko si ofin, ese ko si nibe* meaning that in a society where there is no law, sin cannot be imputed.

[81] Dworkin, R.M. (ed.) Oxford Readings in Philosophy. *Philosophy of Law*, Oxford: Oxford University Press, 1977, p. 1.

The importance of this proverb in the interrogation of the relation between law and morality in African philosophy and jurisprudence cannot be overemphasized. A little reflection is needed to point out some items of intellectual and jurisprudential interests. *Ofin* here means law in the literal, ordinary sense. *Ese* here means sin or transgression. From this adage or proverb, it is suggested that breaking the *ofin* makes one a sinner or transgressor i.e. *elese* one who transgresses. But then, in ordinary, normal English usage, the idea of law-breaking is not often conflated with the notion of sin. In other words, law-breaking is not often ascribed a moral status. But that is what the Yoruba linguistic economy has succeeded in doing. The breaking of law is defined in a moral, evaluative sense rather than a purely legal sense.

The deduction is that the foundation of human interaction with the law, given the validity and truth of this Yoruba linguistic economy, is removed from the realm of the legal and placed within the realm of the moral. This distinction therefore becomes of utmost significance in that it establishes the inseparability of the legal and the moral in Yoruba philosophy. In most cases, in general jurisprudence, breaking the law is not always seen in the moral perspective. If it is so, then it removes the understanding of law away from the purely legal perspective as most legal positivists have consistently argued it to be. For example, to have broken the law in English and American jurisprudence does not warrant the appellation of a sinner. 'Sinning' is a religious, moral concept with a distinct metaphysical coloration quite removed from jurisprudential parlance. But then, what is implied in that adage is the conflation of the legal and the moral going by the meaning of words in Yoruba philosophy.

One rebuttal of this line of reasoning consists in the view that the import of that adage or proverb has been subjected to a heavy dose of foreign religious influence. As such, one is not exactly sure of who owns the proverb or adage - the

traditional Yoruba or a modern mixture of thoughts arising from these foreign religious influences or anthropological conceptual superimposition. As a matter of fact, it is reasoned that it is in Christianity, for instance, that breaking of law is seen as a matter of sinning or transgression. In other words, it is believed that the import of that adage has a Christian religious undertone than a legal or jurisprudential import.

If we are to accept that line of reasoning, what it will amount to is that Yoruba people are not religious and that they do not have the concept of sin. But then, this is not true. Even though we must accept the view that there are many religious concepts, ideas and notions that have come to be accepted in African philosophy of religion (such as the idea of the Supreme Being) which are borrowed or products of conceptual superimpositions, the fact still remains that Yoruba people have a notion of sin just as they have of right and wrong. And the placing of this perspective for them is important not only in the religious realm but also in the jurisprudential realm as well.

This is the reason why the Yoruba jurisprudential framework collapses the distinction often held between what is social, ethical, legal or simply political. This conflation is, perhaps, informed by the view that law and morality are conceptually complementary. The basic rationale behind the closing of the gap between these areas of human life consists in the view that no area of human life is left to chances. Legal and moral categories encode a necessary relationship, not contingent. The principles underlying this jurisprudential framework are often sometimes rigid.

Again, a deep understanding of the foundation of political interaction and interplay in African societies often compel one to arrive at the conclusion that law and morality are embedded in an inseparable connection when seen as complementary concepts. Among the Yoruba, for example, three points of wisdom are the constituents

of both traditional and even modern Yoruba society. The first wisdom is law or commands i.e. *Ase*, the second wisdom is culture and moral standards as reflected in social practices i.e. *Asa ati Ise* and the last wisdom is taboo i.e. *Eewo. Ase* is the reflection of the king's command or the directives of the government which are believed to be unbreakable. The unbreakability of these commands derives from the second and third wisdom which are the culture, practices and the taboos of the land. These points of wisdom are either formally or informally portrayed in practices and actions that are commonplace in the society.[82]

The summary of the arguments consist in the proposition that African jurisprudence subscribes to an inseparable relation between law and morality in the sense that law and morality are viewed in a conceptually complementary relation. This conceptual complementary relationship derives, first, in the conceptual metaphysical worldview existent within the relevant system and, secondly, is also corroborated in the linguistic economy that is operational within that system.

An acceptance of the thesis of conceptual complementarism may end up being a likely strong challenger for the separability thesis propounded by legal positivists. Some of the issues bordering on the separability thesis *a propos* the thesis of conceptual complementarism can be considered in their minute details and it may be discovered that there might be the need for revision, perhaps, on the separability thesis and its other dimensions.

For example, an evaluation of Austin's separability thesis in the light of the conceptual complementariness of law and morality will require some amount of modification. If law and morality are indeed complementary, it will be sterile contending that the demerit or merit of law is separate from its existence. In actual

[82] Adegboyega Sobande, "Eewo" in *Iwe Asa Ibile Yoruba* edited by Oludare Olajubu, Ikeja: Longman Nigeria Limited, 1978, p.23

fact, if law and morality are complementary, then part of what is involved in saying that a law exists is that its existence is immensely important in the light of its complement which is, in this case, morality. The existence of law will thus not be a different inquiry given the fact that it has a complement that makes that existence meaningful. It is still reiterated that if a concept is a complement to another concept, though both are different, it does not follow that they are separable. A complementary relationship establishes that both concepts are necessary to each other. This necessity is defined not in terms of similarity but in terms of complementarity. Two concepts need not be similar before we can establish inseparability. Such a case of inseparability can be demonstrated once it is the case that both concepts are complementary. Thus, what we argue for is a case of conceptual complementariness between law and morality, and not conceptual separability. In most African societies, particularly the ones we examined such as the Barotse, Igbo and Yoruba cultures, law and morality are embroiled in a kind of complementary relationship.

But then since the Austinian separability is not representative of legal positivists' claim on separability thesis, we shall examine other explanations and versions and see how they fare in the light of critical evaluation. For example, Hart's version of legal positivism and the separability thesis is thought provoking and of large scale interest to modern jurisprudence. One of the points on which Hart's defence of the separability thesis has been acclaimed is his formulation of what he calls 'the rule of recognition' which is very important in the definition of legal validity. Based on this, Hart was particularly emphatic on the importance of the rule of recognition in defining the separability thesis. It was in the light of this that Hart postulated legal positivists' separability thesis to mean that

> *In the absence of an expressed constitutional or legal provision, it could not follow from the mere fact that a rule violated standards of morality that it was not a rule of law; and conversely, it could not follow from the mere fact that a rule was morally desirable that it was a rule of law.*[83]

in spite of the clarity of Hart's formulation of the separability thesis, it is still in need of further clarification. The reasoning here is that Hart's conclusion is based on some confusion between something being conceptually dissimilar or different and its being conceptually separable from another thing. On this, it is to be stated again that to be conceptually dissimilar does not connote being conceptually separable. To define separability in terms of dissimilarity is not enough. What would be needed is the analysis of a third component which is whether the concepts in question are complementary or not. It is when the complementariness or otherwise of the concepts has been determined that one can establish the claim of separability or inseparability.

If law and morality are dissimilar, it does not mean they cannot be inseparable. The complementariness establishes the inseparability, not the dissimilaritiness, although, at the same time, it does not deny the dissimilarity. Our argument for the inseparability of law and morality in Yoruba jurisprudence, Barotse or Igbo jurisprudence is grounded on the fact that, it is observed that both are complementary concepts in the building and maintenance of a legal system. In such societies, the legal culture or system may not even incorporate the rule of recognition which Hart maintains. As a matter of fact, even in advanced western countries, not all legal systems exhibit an atom of Hart's rule of recognition. For example, as contended by Greenawalt, there is no identifiable rule of recognition in the American legal system. The existence of valid laws in the United States is therefore not reducible to

[83] Hart, H. L. A. "Positivism and the Separation of Law and Morals", *Harvard Law Review*, vol. 71 (1957-58), p. 599.

social facts. This is the reason why Dahlman, for instance, suggested that the rule of recognition be taken to the slaughter.[84]

Furthermore, the modern version of the separability thesis can be evaluated in the light of the thesis of conceptual complementariness. For example, according to exclusive positivists, for any possible legal system, the rule of recognition in that system contains only non-moral criteria.[85] We have just hinted at the fact that not all possible legal systems has a rule of recognition, at least going by the opinion akin to Greenawalt's observation on the absence of a rule of recognition in the American system. It is not too certain whether, under the African cultures examined, there are rules of recognition. What is certain, however, is that the criteria for legal validity, regardless of how rudimentary and non-sophisticated such systems can be, abundantly reflect the presence of moral criteria. To this end, exclusive positivists' separation thesis may require some modification.

Also, it will not be true that the thesis of ethical positivism and some other versions of the separability thesis can be maintained if we agree to the argument on the conceptual complementary nature of the relation between law and morality. For example, some other versions of the separability thesis such as ethical positivism may be found wanting. The claim of ethical positivism is the view that the determinations of law ought never to depend on moral considerations even though they in fact quite often do in the operation of modern legal systems. In other words, Campbell's reasoning consists in the view that as a matter of sound political morality, the "identification and application of law ought to be kept as separate as possible from the moral judgments which go into the making of law."[86] We tend to suspect that

[84] Greenawalt, "The Rule of Recognition and the Constitution", 85 *Michigan Law Review* (1987), p. 621.
[85] Morauta, J. *op. cit.*, p. 117.
[86] Campbell, T. *The Legal Theory of Ethical Positivism*, Aldershot: Dartmouth Publishing Co. Ltd., 1996, p. 3.

Campbell's postulation is also anchored on a supposed notion of conceptual dissimilarity between law and morality.

Again, there is something wrong here simply because having defined law and morality in complementary terms, it is utterly pointless to advocate for a separation. Where complementariness is established, it is equally inexpedient to canvass for separation between what are conceptually complementary. The possibility of ethical positivism, as advocated by Campbell, depends on the denial of complementariness between law and morality. Again, the absurdities inherent in both the fallibility and neutrality theses are glaring. The fallibility thesis is the view that law does not necessarily have positive moral value. On the other hand, the neutrality thesis states that in defending our conceptual claims about law, we ought to steer clear of moral factors. The fallibility thesis, for instance, cannot hold in African jurisprudence simply because law has a moral value by virtue of its being a complement to morality.

In the same vein, the neutrality thesis is implausible and difficult to defend in the face of the complementary nature of law and morality. In other words, the complementary nature of law and morality is a telling argument that law cannot be conceived in neutral terms. In the tenets of African jurisprudence, the nature of law is such that it is not only sourced in morally laden and evaluative terms, but also in the fact that it elicits certain moral ends in a given society. Given the truth of this assertion, it is submitted that it is difficult to create a conceptual consideration of law and defend such claims without recourse to some moral factors which it elicits. In other words, law is clustered around institutional, cultural and behaviouristic assumptions which render a morally neutral appraisal of law a huge jurisprudential task to achieve.

A more probing analysis of the separability thesis in the light of the features of African jurisprudence can be undertaken. It is contended that underlying every attempt at separating law from morality by prominent legal positivists is the deliberate exchange of speculation with legitimate reality. Beneath this exchange, however, is a great denial: the denial of the complementariness of law and morality in every legal system. A tinker with the respective and various nuances of such separability thesis has shown this.

There are many possible objections to this conceptual understanding of the relationship between law and morality in African jurisprudence. Legal philosophers criticise as well as originate and expound legal concepts and ideas. And their critical efforts commonly advance the subject. According to Robert Summers, objects of criticism in legal and moral philosophy vary greatly. The problem that a thinker has set out for himself may itself come under attack, or it may be criticised as fundamentally misconceived. At other times, the way the problem is posed may come under critical evaluation. Indeed, critical analysis may be an avenue of progress as significant as original work itself.[87]

About the most notable example of the objection to this thesis consists in the fact that if it is true that African jurisprudence endorses an inseparability thesis between the concept of law and morality because both are said to be engaged in a kind of conceptual complementariness, can this same thesis hold in western jurisprudence? If it cannot, what then will be its contribution to general jurisprudence? Again, the objection could be that a conceptually complementary relationship between law and morality in African jurisprudence is difficult to prove since it does not suggest a kind of necessity and neither does it answer the positivists'

[87] Robert S. Summers, "Notes on Criticism in Legal Philosophy" in R. S. Summers (ed.) *More Essays in Legal Philosophy General Assessment of Legal Philosophies*, Oxford: Basil Blackwell, 1971, p. 1.

claim. In other words, that it is possible to hold a thesis of complementariness and yet be steadfast on separability. The necessity will still have to be proved. In proving this, it will have to be shown whether the concepts of morality in African philosophy of society independently speak of the concept of law and vice versa. To assume that they do is not the point but to show it.

If our answer to the objections is anything to go by, we may be inclined to say that nothing is impaired for general jurisprudence if it is held that the path and status of African jurisprudence necessarily intersects with the paths of jurisprudence in other cultures and other traditions. Even if the thesis adumbrated here were to hold for western jurisprudence, it is nevertheless a truism that the premises may not be the same since there is always an assumption of distinctness in every cultural report about aspects of human existence and human social activities. Besides, granted also that this thesis could hold in western jurisprudence, it still does not follow that this status of African jurisprudence is or can be denied relevance in general jurisprudence. There will always be nuances that make for distinction.

4.4 CONCLUSION

It is therefore our submission that all theories of positivism, whether in terms of neutrality thesis, ethical positivism, fallibility thesis or whatever else, advocating for separation of law and morality in one way or the other can be branded as the exchange of mere speculation for what is clearly a legitimate reality. Many positivists may not agree with the view that the separation thesis is self-stultifying in the face of the thesis of conceptual complementarism. However, in relation to African jurisprudence, this thesis is foundational to most African cultures and philosophy of society. To argue for and impliedly endorse the separability thesis in African

jurisprudential universe is to abandon and underestimate the core realities of the African legal universe.

CHAPTER FIVE:
SUMMARY AND CONCLUSION

5.1 AN OVERVIEW

The purpose and objective of this research has been to attempt a critical interrogation of the separability thesis in the context of an African jurisprudence. In doing this, in specific terms, the nature of Yoruba political philosophy and jurisprudence has been the focus of attention even though an attempt was made to corroborate the thesis of that culture's jurisprudence from the standpoint of other similar cultures in Africa.

This was done by dividing the work into five chapters. Each of the chapters has attempted to express in clear terms what is accepted as the core of controversy, the current disputes and the varying and various positions maintained and adopted by proponents and opponents alike on the issues discussed in the chapter. This was done in the bid to ensure that what matters and are crucial are given urgent attention.

Furthermore, the chapters in the work ensured that while trying to analyse and flesh out the controversies between one school and another, what is relevant and important are what is given considerations and ultimately allowed to guide the positions reached. In every instance in each of the chapters, a particular position and standpoint has been assumed and maintained. This position has been used as the anchor point in the arguments and the grounds marshalled in establishing the claim of the work.

The claim, and grand thesis, of this work consists in the view that a critical examination of the separability thesis in the context of an African jurisprudence reveals that, in the context of such an African jurisprudence, for examples, the nature of Yoruba jurisprudence, Igbo jurisprudence and Barotse jurisprudence, the

separability thesis, that is, the view that law and morality are conceptually separable, is not as forceful and appealing as it appears to be in the presentations of legal positivists. It appears that there are evidences pointing to the fact that African jurisprudence, as seen from the perspective of the idea of law three cultures i.e. Yoruba, Igbo and Barotse jurisprudence, endorses a kind of inseparability between law and morality.

No doubt, the canons of an African jurisprudence may serve as very important contributions to existing controversies within general jurisprudence. However, only very few attempts exists in this jurisprudence in terms of critical reflections on specific problems and controversies in the field of general jurisprudence. It is in this sense that we need to understand the view of Onwuejeogwu that "African law remains largely untouched,"[1] Elias expressed a similar view of African jurisprudence which, in his words, remains "an hitherto uncharted field of general legal theory"[2]

On the connection between law and morality, there is a wide gap that needs to be filled. What animates this present work is informed by the challenge to fill that gap. The successful filling of that gap will serve as a clear demonstration of the significance of African jurisprudence in the light of what Max Gluckman calls "the long-standing controversies in modern jurisprudence."[3]

Although what has been articulated herein and elsewhere as African jurisprudence lacks a detailed discussion of many traditional problems in general jurisprudence such as the relation between law and morality, due recognition has been given to the few African and non-African scholars such as Gluckman,[4] Adewoye[5]

[1] Onwuejeogwu, M. A. *The Social Anthropology of Africa*, Ibadan: Heinemann Educational Books , 1992, p. 116.
[2] Elias, *The Nature of African Customary Law*, p. 4.
[3] Max Gluckman, *Order and Rebellion in Tribal Africa*, London: Cohen and West, 1963, p. 180.
[4] Max Gluckman, *Order and Rebellion in Tribal Africa* chp. 7, London: Cohen and West, 1963

and Okafor[6] who have in one way or the other hinted at or touched on the idea of law and morality in African law. 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.

A critical study of the various arguments and positions maintained by the various scholars and sources studied on the relation between law and morality shows that law and morality are inseparable in African jurisprudence. Even though each of these views seems to endorse a kind of inseparability thesis, it is submitted that their respective arguments are weak and inconclusive against legal positivists' separability thesis. This thesis has therefore articulated additional arguments and analyses in support of the inseparability thesis in an African context, especially in Yoruba jurisprudence.

In specific terms, those earlier discussions are said to be unsatisfactory because, apart from being weak and inconclusive against legal positivism, they are not sufficiently comprehensive and they are not generated within any particular theoretical framework, such as an established theory of African law. The issue here is that no substantive theory or conception of African law that generates or could generate the relation between law and morality as discussed by Adewoye, Gluckman and Okafor has either been identified or articulated.

In brewing a marked and radical departure from the thesis of these scholars, the thesis articulated in the present work is that a careful consideration of the substance of African jurisprudence, as specifically seen from the nature of Yoruba jurisprudence leads to the view that law and morality are entailed in a kind of

[5] Adewoye Omoniyi, "Proverbs as Vehicle of Juristic Thought Among the Yoruba" in *Obafemi Awolowo University Law Journal*, January & July 1987.
[6] F. U. Okafor, "Legal Positivism and the African Legal Tradition" in *International Philosophical Quarterly*, No. 2, Issue No. 94, June 1984.

conceptual complementarity rather than conceptual separability. The conceptual complementarity thesis holds that although the concepts of law and morality may be dissimilar, in the sense of not being identical, that dissimilarity does not suggest or imply separation of the two concepts. It was further argued that to establish the case for conceptual separation is completely at odds with the dialectical nature of both concepts. In searching for the basis of the conceptual complementarity of law and morality, what have been examined are not the concepts in themselves alone but their roles in the light of core social reality. Thus, an attempt at defining law and morality, in the light of the claim of conceptual complementarity, is an observation of reality. In the words of Hart, "In searching for and finding definitions we are looking not merely at words... but also at the realities we use words to talk about. We are using a sharpened awareness of words to sharpen our perception of the phenomena."[7]

This conceptual complimentary relationship between law and morality is dialectical in the sense that the view that both may not be logically dependent on each other is rendered vacuous by the fact that although both phenomena are conceptually unidentical or dissimilar, neither of them is complete, in conception and in practice, without the other. That is, although we may freely agree that law is law and morality is morality, we can further also see that their distinguishability does not presuppose or imply that they are not mutually involving. It is this constant mutual involvement that makes them conceptually complementary.

The definition of difference, as conceptual complementarism sees it, is only an opportunity for an extensive definition of morality in terms of law and vice versa. This extensive definition of both concepts in terms of each other in the framework of conceptual complementarism consists in the fact that both concepts are mutually

[7] Hart, H. L. A. *The Concept of Law*, Oxford: Clarendon Press, 1961, p. 38.

involved, such that one cannot think or talk of one without the other. One is incomplete in a legal system without the other. It is in this sense that it is being suggested here that taking laws separately from morality makes a legal system incomplete and, as such, that a legal system is necessarily built on and revolves around some moral standards. This necessity, in terms of complementarity, is what is implied when it is said that one is an extension of the meaning and intelligibility of the other. A conceptually complementary relationship cannot be defined in terms of the notion of separability. This kind of conceptual complementarism differs from other possible existing positions in African jurisprudence, which were earlier articulated and examined in chapter four of this thesis.

In effect, what has been demonstrated relevantly in each of the chapters in this work is not a comparative show of superiority-inferiority model. In other words, the project is not a comparative study of western jurisprudence and African jurisprudence. Rather, what the thesis has done is to elicit some of the important and perhaps, forgotten aspects of African life in the process of canonisation of ideas in the area of jurisprudence, in particular, and in the interpretation of general social history.

More importantly is the view that an examination of the separability thesis in the context of the nature of African jurisprudence is based on the premise that African contribution to mainstream jurisprudence is not only a timely and relevant contribution to general jurisprudence, but also a part of the wider framework of general jurisprudence. In the words of Murungi, "the province of African jurisprudence is what it is, in part, by its intersection with other provinces of jurisprudence."[8]

[8] 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, 2004, pp: 519-526, at p. 519.

Therefore, the intellectual possibilities inherent in the nature of African jurisprudence consist in the view that "African law, when once its essential characteristics are fully appreciated, forms part and parcel of law in general."[9]

In furtherance of this, the division of the work in terms of chapterisation takes off from the fact that there has been the history of debates in general jurisprudence. The articulation of this work's thesis on the relation between law and morality was built on that history. The work was divided into five chapters with the first two chapters devoted to apt analyses of the classical debates in western jurisprudence over the relation between law and morality. Chapters three and four were devoted to the nature of African jurisprudence and its substance and significance concerning the relation between law and morality. The last chapter summarises the work and presents the conclusion.

What was argued in chapter one titled **"Jurisprudence and the Relation between Law and Morality"** consists in the view that the problem of the relation between law and morality is basically conceptual, as it arises from the controversies over what jurisprudence is and what the law is. In other words, since jurisprudential discourses present diverse opinions on what jurisprudence is, with the traditions that have grown out of them, we cannot but have abiding and unsettled controversies on the nature of the relation between law and morality. It was equally contended that the lingering controversies in jurisprudential discourses afford an opening for the idea of cultural jurisprudence, and hence, the possibility and desirability of multicultural contributions to the issue of the relation between law and morality.

The discovery of the chapter consists in the view that the relation between law and morality is a perennial problem in jurisprudence. It also discovers that the

[9] Elias, *The Nature of African Customary Law*, p. v.

perenniality of the problem can be validated in the fact that there are several and divergent orientations in which the subject matter of jurisprudence and law have been and are still been viewed. This explains, the thesis discovers, the reasons why analytical jurisprudence is different from sociological jurisprudence, and postmodernist jurisprudence is different from globalised jurisprudence. In fact, as part of its discovery, some orientations exist in jurisprudence with critical challenges on the perceived notions of what jurisprudence is. Such orientations are radically opposed to the mere speculative nature of modern and classical jurisprudence. A more scientific task is therefore defined for the analysis and study of law.

The cardinality of the problem of relation between law and morality, in legal philosophy, has been framed into a four-perspective scheme of discussion. These perspectives are: the historical, the validity-obligatory, the necessity, the logical/conceptual, and the enforcement/criminalisation perspectives. A fifth perspective, not discernible in extant literature, was, however, considered to be important and added; this is the cultural perspective. Each of these perspectives was discussed and it was discovered that the contention and the debates in each of these perspectives have serious implications on whatever philosophical attitudes are adopted towards the other perspectives.

The conclusion of the chapter consists in the view that the nature of the problem of the relation between law and morality, in legal philosophy, can be described as conceptual. It was further concluded that the problem has serious practical, pragmatic and functional consequences. In very important cases, as observed in legal philosophy, the conceptual nature of philosophical controversies in law appears indefinable since the concepts that each school or worldview adopts are

projected as if they do not represent reality and if, per chance, they do, as if those concepts capture the whole of reality.

In chapter two, which is titled **"The Separability Thesis"**, various aspects of the separability thesis, as defended and propagated by classical and modern legal positivists' were analysed. In the first instance, the meaning of legal positivism was explicated and clarified. This produced two frameworks of definitions of legal positivism which were carefully examined. These are the definitions of Herbert Lionel Alphonsus Hart and Norberto Bobbio. In relation to the separability thesis, the definition of Hart was discovered to be in line with contemporary and modern trends in the discussion of legal positivism.

The chapter argued that Hart's position in legal positivism and on the defence of the thesis of separation between law and morality is unassailable. This, it was argued, is because contemporary differences between exclusive and inclusive positivism owe their analytical distinctions to the work of Hart. The view that Hart's analysis provides the needed bridge between classical and modern legal positivism was also presented. The presentation of this view includes the observation that the rigour of analytical philosophy, as practiced by Hart, facilitated the removal of the conceptual absurdities inherent in classical positivism. The chapter also undertook a critical analysis of the views of some notable positivists including Thomas Hobbes, David Hume, Jeremy Bentham and John Austin on the separability thesis were carefully analysed.

Moreover, a study of the discussion of legal positivism in modern times, especially taking off from the work of Hart, was undertaken. It was discovered that Hart's work forms the major criterion for regarding a positivists as either an exclusive positivist or an inclusive positivist. The main line of difference between the exclusive

positivists and the inclusive positivists centres on the salience of morality in the identification of the criteria of legal validity. While the former contends that morality is not one of the criteria for legal validity, the latter concludes and asserts that morality may form part of the criteria of legal validity. Inclusivists, however, add the view that the thesis of soft positivism should not be confused with the view that morality and law are conceptually inseparable.

From these discoveries, the chapter concluded that consequent upon a critical survey and examination, the legal positivists' position on the relationship of law and morality is seriously challenged by its seemingly intractable revisions and ambiguities. As part of its conclusions, the chapter observes that what the separability thesis amounts to, especially in the light of its history, is different from what contemporary positivists often take the thesis to be.

The conclusion of this chapter is that from common sense and experience and the chequered history of ideas, it has not been proved, empirically, that both concepts are completely independent of each other. Both concepts often reinforce each other. Many times, the concept of law has been very useful in the clarification of moral concepts and vice versa. Often times, their independent status is not definable in terms of separation.

If the opinion of Hart is accepted, that jurisprudential problems and debates stands to be resolved just in case we have a clue to the definition of law, then it behoves us to say that the contentions over the separability thesis, arising from what our definition of law is, can be described as nothing but a confusion or disagreements over the nature of the use of words, even though many ideological pretensions seems to underlie the use of the words in question.

Chapter three of this work titled **"On the Question of the Nature of African Jurisprudence"** was devoted to a critical analysis of the nature of African jurisprudence. One of the discoveries of the chapter is that African jurisprudence is an integral aspect of African philosophy. In this regard, the chapter argued that the philosophical activeness of Africa is clearer in jurisprudence than in many other areas of intellectual endeavour. This is because law reflected the imperatives of changing economic, political, social and ideological circumstances. The presence of this jurisprudence is seen as the strongest argument against any denial of African philosophy, based on the incontrovertible truth that inherent in every system of jurisprudence is an underlying philosophy. The articulation of such a jurisprudential outlook, no matter how rudimentary, presupposes the existence of a philosophical worldview.

Given this, the chapter identified reconciliation, conciliation and restorative justice as important ideas in the understanding of African jurisprudence. This thesis was buttressed in the chapter by a consideration of the substance of Yoruba jurisprudence, Barotse jurisprudence and some other jurisprudential cultures in Africa with similar and familiar legal traditions. The chapter further argued that the reason why African jurisprudence appears to be missing in the list of jurisprudential theories is not sourced in its lack of merit, but in the fact that jurisprudence is open and subject to a kind of historiography which is defined and dominated by the western world.

In the end, the chapter concluded that the attempts to ignore the reality of African systems of thought in general and African jurisprudence in particular, has a peculiar history. This history, according to our reasoning, is enmeshed in the projection of the claim of European superiority. One of the historical interludes

designed to achieve the task was colonialism. Mann and Roberts equally observed that colonialism changed African law in terms of rules, institutions, procedures, and meanings. In their words, "any understanding of the role of law in contemporary Africa must rest on an appreciation of the legal rules and institutions, processes and meanings created under colonialism. The history of law in colonial Africa forms an important chapter in the story of the expansion of western law overseas.[10]

Chapter four of the work is titled "**African Jurisprudence and the Separability Thesis**" which is actually the major area of attention and focus of the thesis. The chapter opened with a critical comment on erstwhile considerations of the substance of African law. These considerations appeared to be apologetic, rather than assertive, over the validity and authenticity of African jurisprudence. The chapter argued that although while there have been very few scholars who have hinted at the idea of the relation of law and morality in African law, those few attempts are seriously defective and so, inadequate.

The chapter concluded that a credible critique of the positivists' separability thesis in the context of African jurisprudence cannot be conceived in the way that those few scholars have conceived it. This, it was argued, will have to be better done by articulating and arguing for a conceptual complementariness between law and morality which enables the thesis of African jurisprudence to afford a critical appraisal of the separability thesis. The separability thesis, as the chapter concluded, is an absent thesis in the canons of African jurisprudence. This is because law and morality are held to be conceptually complementary. The chapter concluded that from the perspective of African jurisprudence, the fact that law and morality are dissimilar and distinguishable neither suggests nor presupposes that they are separable from one

[10] Ibid., p. 5.

another. The chapter was of the concluding view that a reconciliatory, conciliatory or restorative theory of law is in consonance with African jurisprudence and that such a theory of law does not admit of a separation between law and morality. This, it was argued, is because reconciliation, conciliation and restoration entail a continuum between what is legal and what is moral in the promotion of social stability and equilibrium.

5.2 AFRICAN JURISPRUDENCE: CHALLENGES AND POSSIBILITY OF FURTHER RESEARCH DIRECTIONS

As an intellectual discipline, jurisprudence has attracted the least of intense critical attention in contemporary studies on Africa. In very compelling terms, the subject of the state in Africa is incomplete without a critical analysis of the legal ideology or philosophy that undergird it. While the state has been given a form of unrelenting attention and academic study, the subject of African jurisprudence, especially in relation to African state has not been given the attention it deserves.

At the level of perception, it is contended that the failure to see the connection between the state and the subject of jurisprudence readily captures the absence of attention in the literature on the importance of jurisprudence. This intellectual oversight is most likely a consequence of African jurisprudence having been misconceived and misrepresented.

There are and have been many dimensions to the misrepresentation of the nature of jurisprudence and its application to Africa. The misrepresentation could possibly be due to the thought that jurisprudence is a mere accumulation of ancient wisdom that has no relevance for the understanding of the problems of Africa. In a reverse order, the importance of Africa to the understanding of jurisprudential problems and controversies has also been essentially undermined and underemphasised.

In another instance, it is also possible that many critics of the subject of African jurisprudence create their own difficulties about the subject by forcing certain conclusions on the nature of the discipline. One of such conclusions is that since jurisprudence is merely and entirely speculative, and speculation is a non-existing activity in Africa, jurisprudence is non-existing in Africa. From this illegitimate conclusion, the whole discipline of jurisprudence and by extension, African jurisprudence, is voted out of timely and contemporary interest and importance in Africa.

Often times, the assumption beneath such conclusion about the nature of jurisprudence, and its African dimension, is contained in the view that there is a demand for scientificity, a quality which is said to be lacking in African jurisprudence, as a result of its nature. Jurisprudence is of interests in these contemporary times to many areas of study considering the fact that our every day life is dependent on the kind of relationship we have with the central concerns of jurisprudence.

The central concern of the modern world is the need to understand the nature and functions of law in every society, including Africa. This makes the study of the nature of law the central concern of jurisprudence, and African jurisprudence in particular. According to Freeman, what jurisprudence has done in recent times is to bring to the core the salience and relevance of the debates and arguments of classical thinkers on the nature of law.[11]

Freeman's timely observation and remark are important for African jurisprudence in two vital respects. In the first instance, it suggests the possible line of research direction for more proper and up-to-date understanding and development of what is known as African jurisprudence. One of the urgent tasks ahead of the

[11] Freeman, M. D. A. *Lloyd's Introduction to Jurisprudence*, 6th Edition, London: Sweet and Maxwell, 1996, p. 16.

discipline of African jurisprudence is to tap into the debates and arguments of classical thinkers on the nature of law in order to define very clearly an African perspective in contemporary jurisprudence. This consists in unearthing, on one hand, and analysing the importance and relevance of, on the other hand, African thoughts in relation to very specific and key debates, problems and controversies in the larger field of general jurisprudence. What has been attempted here is an investigation of African jurisprudence in the light of the relation between law and morality. This is just one direction of research. Many other possibilities still exist and which can be undertaken.

In the second instance, it serves as a reminder of the variety of the challenges on the nature and relevance of the project of African jurisprudence. These challenges can be conceived in both the positive and negative senses. In the remainder of this chapter, an analysis of these challenges on the relevance and application of African jurisprudence is attempted.

5.2.1 AFRICAN JURISPRUDENCE: FURTHER RESEARCH DIRECTIONS

The discipline of jurisprudence is known to be a vast field of intellectual inquiry into the phenomena of law. This means that every item of human knowledge that carries and attracts the subject matter of law is not only related to jurisprudence and thus important for it, but also makes its discussion, analysis, examination and interrogation living and lively. In other words, it means jurisprudence is incomplete, inadequate and indefensible without such items of knowledge. It is in this sense that Ronald Dworkin sees jurisprudence, sometimes construed to mean legal philosophy, as an essentially parasitic field or sub-discipline of philosophy. But then, the parasitic nature of jurisprudence is not a derisory label since it is sometimes assumed that no area of human knowledge stands on its own without one form of dependence or the

other on other areas of human knowledge that may be regarded as cognate or relevant to it.

Once this is an acceptable proposition about the general field of jurisprudence, it will simply follow that African jurisprudence shares a similar and familiar providence and fortune. As an emerging discipline, African jurisprudence faces the challenges of building what can be characterised as its contribution to the nature of jurisprudence in general and carving out a niche of its own. This may involve elements of interpretive methodology, re-interpretation and reconstructionism. In this sense, it follows that whatever parasitic nature is ascribed to African jurisprudence would be in accordance with the nature of jurisprudence in general.

Given this, it is suggested that African jurisprudence entails further possibilities more than what is set forth here. The limitations of the nature of African jurisprudence as outlined in this work contains, it is suggested, an insight into the discovery of the nature of possible research directions that future studies of African jurisprudence entail. Some of the themes relevant to the field of African jurisprudence suggestive of further research can be categorised into three parts: one relates to the introductory aspects of African jurisprudence, the second relates to the working out of the basic concepts of African jurisprudence and the third relates to understanding and conceptualising the problems of African jurisprudence. These research possibilities are briefly discussed below.

5.2.1.1 FURTHER RESEARCH POSSIBILITIES ON THE NATURE OF AFRICAN JURISPRUDENCE

If there is any aspect of African jurisprudence which stands in need of further research, basically, the nature and character of African jurisprudence will pass for such an aspect. In the first sense, what is needed in this direction is the working out of

a critical outline of the connection between philosophy, African philosophy and African jurisprudence. This is needed to create a kind of conceptual linkage between the discipline of philosophy in general and the discipline of African philosophy. This task is an on-going one and is being excellently done by many African and non-African philosophers. The literature is replete with insightful and conceptually rich efforts at establishing and perpetuating the nature of African philosophy.[12]

But then, while this is true, what appears in need of further research in the African philosophical debate in general is the jurisprudential aspect. A careful look at each of the literature cited below shows that only very few made an attempt to discuss, from a philosophical point of view, what the nature of African jurisprudence or philosophy of law is or should like. It is, therefore, not a misnomer to advocate that the direction of research in African philosophy should observe a rethinking with respect to some other outstanding aspects of the African thought life and existence. One of such areas of the African life concerns the nature of jurisprudence in Africa. As emerging discussions are found on African aesthetics, arts, religion, ethics, morality, politics, technology, medicine, discussions are also invited on the nature of African jurisprudence.

[12] See for examples, Imbo, S. O. *An Introduction to African Philosophy*, Maryland: Rowman and Littlefield, 1998; Eze, Emmanuel Chukwudi, ed. *African Philosophy: An Anthology*, Cambridge, Massachusetts: Blackwell, 1997; Kwasi Wiredu, (Ed.) *A Companion to African Philosophy*, Malden Massachusetts: Blackwell Publishing Limited, 2004; Appiah, K. A. *In My Father's House: Africa in the Philosophy of Culture*, New York: Oxford University Press, 1992; Diop, C. A. *Civilisation or Barbarism: An Authentic Anthropology*, Brooklyn: Lawrence Hill Books, 1991; Eze, C. E. (ed.) *Postcolonial African Philosophy: A Critical Reader*, Cambridge, Massachusetts: Blackwell, 1997; Hountoundji, P. *African Philosophy: Myth or Reality?*, Bloomington: Indiana University Press, 1996; Masolo, D. A. *African Philosophy in Search of Identity*, Bloomington: Indiana University Press, 1994; Mudimbe, V. Y. *The Invention of Africa: Gnosis, Philosophy, and the Order of Knowledge*, Bloomington: Indiana University Press, 1988; Oruka, O. *Sage Philosophy: Indigenous Thinkers and Modern Debate on African Philosophy*, Leiden: E. J. Brill, 1990; etc.

5.2.1.2 FURTHER RESEARCH POSSIBILITIES ON THE BASIC CONCEPTS IN AFRICAN JURISPRUDENCE

In derivative terms, African jurisprudence can also be understood better when some of the basic concepts are known. Since each language consists of words with meaning, and since such meanings are what guarantee our calling such words with their meanings a concept, it is here being suggested that a conceptual approach can be very useful in the development of African jurisprudence.

To achieve this, it appears to us that existing concepts in general jurisprudence can be resorted to and a distinctive African understanding of such concepts can be built to form the substance of an emerging African jurisprudence. The discussions of such concepts in the light of the character and nature of African jurisprudence can be done in order to understand those problems in general jurisprudence, in the first instance. Secondly, the added advantage is that it will help in the understanding and building of what can be categorised as African jurisprudence.

For example, in general jurisprudence, ethics and socio-political philosophy, the debate between communitarians and libertarians over which is of utmost primacy in the understanding of human society and the creation of privileges and rights, is not only enlivening but equally refreshing. In like manner, debates on equality, liberty and freedom which form the bulk of disquisitions in western philosophy can be extended into the making of the frontiers and boundaries of African jurisprudence. The beauty of this direction of thought is that some concepts may likely emerge in the overall understanding of such general concepts. The fact is that some of these concepts are yet to be seen in the perspective of the African cultural milieu. No doubt, the legacy of a historiography that is heavily Eurocentric accounts for the reason why African input in this direction and on these concepts is found relegated.

The basic substance and basis of African jurisprudence can be built by a solid discussion of the controversy between communitarians and libertarians in the light of African jurisprudence and socio-political philosophy. What is more, the concept of justice, which, in western philosophy, has been approached as consisting of illusive and evasive arguments, can be entered into with the consequent results forming the body of thoughts on African jurisprudence. The same can be said of interesting concepts in western jurisprudence and socio-political philosophy such as the relation between law and force, sanctions or coercion, law and the nature of obligation. These are worthy intellectual inquiries to embark upon to form the nucleus of African jurisprudence.

5.2.1.3 RESEARCH METHODS IN AFRICAN JURISPRUDENCE

About the most important aspect of further research possibilities on the nature of African jurisprudence concerns the nature of the problems of evolving an African jurisprudence or the problems that are plaguing what is identified as forming the substance of an emerging African jurisprudence. In this direction, it is thought that a veritable problem of an emerging African jurisprudence is that of method. Method and theory have their significant roles to play in the articulation and defence of any endeavour, particularly intellectual ones.

Andrew Vincent has significantly argued that a theory is essentially a systematic mesh of interconnected concepts, which purports to characterise, describe and explain reality.[13] In the same vein, Dias explains, most crucially, that a theory is a means towards understanding and the test of scientific theories is predictability.[14]

[13] Vincent, A. *Theories of the State*, Oxford: Basil Blackwell, 1987, p. 40.
[14] Dias, R. W. M. *Jurisprudence*, London: Butterworths, 1985, p. 448.

Central to every theoretical construction is method. Method, argues Catharine MacKinnon, is what shapes each theory's vision of social reality.[15]

The importance of method is thus, in the light of the above, significant. This important task of intellectual work, as it affects the nature of African jurisprudence is also a very important aspect to consider in understanding the future of African jurisprudence. Method is therefore important in working out a system of African jurisprudence and thus extending its future significance.

5.2.2 AFRICAN JURISPRUDENCE: CHALLENGES, PROSPECTS AND APPLICATION

Apart from the possible research directions which the project of African jurisprudence tends to elicit and entail, also worthy of academic attention and intellectual interest are the challenges that appear to confront African jurisprudence. It is therefore suggested that the essential character of these challenges are conscious external impositions rather than an internal frame of mind. In this section, we shall attempt to construct the challenges facing the African state in the light of its jurisprudence. The second challenge that we shall articulate is the present threat of globalisation and democratization.

5.2.2.1 AFRICAN JURISPRUDENCE: THE CHALLENGES AND THE CRISIS OF THE STATE IN AFRICA

Close to three decades now, the State has been at the heart of intellectual and policy debates touching on virtually all aspects of the experiences and prospects of the African continent. The reasons for this concern are diverse. While some are connected with well-founded apprehensions about the origins, structure and record of the state, others have often been propelled by a restricted and tendentious anti-state posture that sometimes tallies with and reinforces a disdainful attitude towards everything

[15] MacKinnon, C. "Feminism, Marxism, Method, and the State: An Agenda for Theory" in *Feminist Social Thought: A Reader*, Meyers D. (ed.), New York; Routledge, 1997, p. 70.

African, even though that which is peculiarly African in such matters are actually not often distinguished from its foreign import.

From the foregoing, it is not difficult to see why the state, as an institution, in Africa has been described in very many disparate ways. It has variously been characterized as "overdeveloped"[16], "prebendal"[17], "patrimonial"/"neo-patrimonial", "rentier", "crony", "unsteady", "kleptocratic", "sultanist", "convivial", a "lame leviathan", an "international Bantustan", "shadow", "criminal", "omnipotent but hardly omnipresent." Evidently, the African state has ended up attracting, when compared to other parts of the world, perhaps, the highest number of descriptive labels.

Again, in the observation of Chabal, there are probably more books on the African state, its problematic and connection to African political life than any other political issue in Africa.[18] In recent studies, also, scholars have given apt intellectual attention on the nature and problematic of the African state particularly in relation to the problem of nation-building. Thus, for example, Victor Azarya described the African state in terms such as "state's incapabilities, its functional decline, instability and inability."[19] On his part, Nwabueze describes the African state "as an illegitimate child of colonialism" lacking in "popular acceptance for itself and its powers."[20] Uroh describes the problematic of the African state as that of "regime delegitimation".[21]

---

[16] See, for examples, Nnoli, *Ethnicity and Development in Nigeria*, 1995; Chabal, op. cit.; 1994; Leys, C. 'The "Overdeveloped" Colonial State: a Re-Evaluation' *Review of African Political Economy*', 5, (1976).
[17] Richard Joseph, *Democracy and Prebendal Politics in Nigeria The Rise and Fall of the Second Republic*, Ibadan: Spectrum Books Limited, 1991
[18] Patrick Chabal, *Power in Africa An Essay in Political Interpretation*, 1994, p. 68.
[19] Azarya, Victor "Reordering State-Society Relations: Incorporation and Disengagement" In *The Precarious Balance: State and Society in Africa* eds. Donald Rothchild and Naomi Chazan, Colorado: Westview Press, 1988, p. 3.
[20] Nwabueze, B. *Democratisation*. Ibadan: Spectrum Books Limited, 1993, p. 7.
[21] Uroh, C.O. 1998. "Beyond Ethnicity: The Crisis of the State and Regime Legitimation in Africa" In *Remaking Africa: Challenges of the Twenty-First Century* Edited by O. Oladipo, Ibadan: Hope Publications, 1998, p. 97.

Unquestionably, therefore, the concept of the state evokes a significant piece of scholarly discussion on the patterns, processes and possibilities of political life, attitudes and interaction in Africa. The weight of meaning that the concept of the state introduces to the scholar in understanding the politics of the African community is aptly demonstrated and clearly spelt out by the observation of Miliband. According to Miliband,

> *More than ever before men now live in the shadow of the state. What they want to achieve, individually or in groups, now mainly depends on the State's sanction and support. But since that sanction and support are not bestowed indiscriminately, they must, ever more directly, seek to influence and shape the State's power and purpose, to try to appropriate it altogether. It is for the State's attention, or its control, that men compete; and it is against the State that beat the waves of social conflict. It is to an ever greater degree the State which men encounter as they confront other men... It is possible not to be interested in what the State does; but it is not possible to be unaffected by it.*[22]

It has become increasingly difficult, in recent times, to completely do away with the overwhelming power and influence of the state. In fact, we might rethink Miliband's view further by saying that though it may be possible not to be interested in what the state does; however, the state makes us at one point or the other interested in what it does.

Although the remarks of Ralph Miliband were made in relation to and in due cognisance of the economically advanced capitalist states, the substance of the thesis outlined above can be proved to be valid conclusions on the nature of political life and the formation that are found to arise there from in the African context. Various reasons can be cited in support of this. Of obvious importance are the historical and material circumstances in which the state in Africa evolved and developed. Most importantly, the subjugating colonial antecedent of the state in Africa must always be borne in mind.

Thus, the concept of the state demands evokes a significant portion of intellectual discourse and critique on the patterns, processes and possibilities of political

[22] Ralph Miliband, *The State in Capitalist Societies*, London: Quarter Books, 1973, p.1.

life, attitudes and interaction in Africa. Summarily, the problems of the African state in her several manifestations of incapabilities as contained in the numerous labels above are weighty arguments in painting Africa's crawling situation.

Cast in a tight global perspective, attempts are beginning to emerge on the characterisation of the African state in the light of the enigma and current phenomena of globalisation. For example, Trevor A. Manuel, Minister of Finance of South Africa ***at the inaugural Global Economic Governance lecture at Oxford University on 8 March, 2004,*** in a Lecture titled ***"Globalization and the African State"*** contended that "Globalization presents a critical challenge to sound economic governance in all states, and in particular African states.'" In another light, he contended as follows: "In part, globalization presents risks to Africa because the apparatus of the state in most African countries is weak, but also because few African states have managed to find the right mix of policy to sustain rapid economic growth and poverty reduction."[23]

However, one aspect of the African state that is yet to be evaluated and critically analysed is the jurisprudence of the African states. In another light, one aspect of the relevance of African jurisprudence often neglected in African studies concerns the relevance of African jurisprudence to understanding the crisis of the African state. To establish the jurisprudence of the African state, for instance, is to make an inquiry into the nature of legal ideology which the state in question is founded, it supports and ultimately which uses in maintaining its hold on power and ascribes to itself legitimacy. It is to investigate the legal history, character, legitimacy and ideology of the state. In a more brusque form, it is to ask the question what is the legal ideological character and history of the African state?

---

[23] Trevor A Manuel, "Globalisation and the African State, in *South Bulletin 78,* http://www.southcentre.org/info/southbulletin/index2.htm

Across Africa, a common experience is the exposure to years of colonial rule. During and after the expiration of colonial rule, the colonial powers imposed nation-states on societies with large numbers of ethnic groups. Clearly, each ethnic group was not sufficiently large to achieve its own state, so groups within states were subsequently ranked according to whether they were a nation, nationality, a national minority, or a tribe. Hence, the construction of the post-colonial nationality started from colonial premises.

Given the historical construction and basis of postcolonial state in Africa, it is submitted that the 'official' jurisprudence of the African State is one that lacks an indigenous basis; it is a borrowed jurisprudence fostered by the ideals and ideas of force and violence rather than a reconciliatory and consensual jurisprudence characteristic of the African philosophy of society. The absence of a reconciliatory and consensual jurisprudence around the African state accounts, in part, for the enigmatic experiments Africa has had to experience in the area of state formation and state construction.

In fact, contemporary evidences of state malformation and convulsive tendencies can be ascribed to the fact that an essential characteristic of the present African state is the operation of a jurisprudence that is strange and alien to the native and indigenous structures and practices in the African world. Rather than foster a jurisprudence which is based on the idea of stateness, that is, a balanced combination of the coercive capacity and infrastructural power of the state with a degree of identification on the part of the citizenry,[24] it continues to wallow in the confines of a borrowed legal ideology of force and violence to establish state authority, legitimacy

[24] Nettle, J. P. "The State as a Conceptual Variable" in *World Politics*, 20/4, 1968, pp:559-92.

and justification. The absence of this kind of jurisprudence explains the reason why the problem of state legitimacy has been perennial.

It is in the light of this that Nwabueze posits that the African state is yet to shed off its character as an illegitimate child of colonialism, lacking popular acceptance for itself and its powers.[25] The basis for its lack of acceptance is due to the fact that it operates a jurisprudence that is historically based not on the people's will or consent but on force and violence, not consensus and compromise, but on an adversarial relation rooted in curious suspicion, in establishing the import of its presence. This explains the distance and dissociation often experienced between the state and society, the government and the governed.

In a nutshell, the jurisprudence of the African state is characteristically undemocratic. Indeed, the jurisprudence of the African state is non-democratic since it lacks the historical and inherent capacity to democratize and domesticate the life of its human members and to do so all the way through. In actual fact, over the years, what the African state has succeeded in doing is the denial of the social and political existence necessary for the transformation of African community life into a framework of commonly and consciously intended social actions where its human members decide what is to be done and in so doing take their destiny firmly into their hands. The *modus operandi* for this great historical denial in Africa is the entrenchment of a state hegemonic culture which sees the thematic and moral search for an end to authoritarian jurisprudence as an attempt to limit its power over society.

In the principal sense, the African state through the colonial state emerged through conquest. To this end, it was a creature of specific historical circumstances. Conquest was the means by which the colonial powers gained ascendancy over the

[25] Ben Nwabueze, *Democratisation*, Ibadan: Spectrum Books Limited, 1993, p. 7.

management of the colonial territories. To have been based on conquest, force, not consent, the colonial state must have understandably introduced into African political and legal landscape a dichotomy in her jurisprudence: the local, customary and native jurisprudence on one hand and Euro-Western jurisprudence on the other.

The existence of both jurisprudences created an unhealthy bifurcation in the administration of the colonial territories. To gain mastery and ascendancy in the colonial territories, the imported Euro-Western jurisprudence resorted to blackmail of native (African) jurisprudence branding it as "detestable aspects of paganism which needs to be wiped out in the name of Christian civilisation." Furthermore, it sees African political and legal culture, beliefs and ideologies of which it is believed ideas of law have necessarily grown as "an undifferentiated mass of custom, rituals and inhuman practices that ought to be abolished *holus bolus*."[26]

But more than this, Euro-Western jurisprudence was clearly antithetical to the spirit and mind of the African since it was a product of violence and force. In the principal sense, African communities, to a large extent, lived a life of social cohesion by the adoption of a theory and system of law that is based not on force but on consensus and reconciliation, a resolution that is based on the people's will, sense of commitment, and belonging . This explains the reconciliatory theory of law popularly held as part of the canons of African jurisprudence. According to Abraham, this kind of reconciliation is lacking in Western jurisprudence where the offender is punished without making restitution. On emerging from prison he is reconciled neither to himself, his victim nor to society.[27]

[26] See Elias, TO (1956) *The Nature of African Customary Law*, Manchester: Manchester University Press 25 for more critical comments on this description of African customary law.
[27] Abraham, JH (1975) *Sociology: A Historical and Contemporary Outline*, London: Holder and Stoughton 2nd edition 187.

In other words, Western jurisprudence is basically a system of logical, impersonal, impartial judgement, following clearly defined legal principles. In this sense, it is easy to understand the view that the jurisprudence of the African post-colonial state was based on violence and force. And, in view of the fact that it is based on force, it was counter productive for the African community and thus to the development of her jurisprudence.

Attempts at constitutional reordering in most African countries has always been a total failure in as much as it undermines the prevalence of reconciliatory jurisprudence but relishes a jurisprudence that is still much tied to the bands and waist of colonial jurisprudence. This is echoed in the words of John Murungi. According to Murungi,

> *Colonial jurisprudence in Africa...was largely the jurisprudence of subjugation. Violence was an essential feature of this jurisprudence. In the eyes of Africans, colonial law was a concrete manifestation of this violence. It was a coercive power in its raw sense. Jurisprudence was the justification or validation of this violence. It was the gunman situation writ large...*[28]

The end of colonialism was that of cultural, mental and psychological dislocation. In fact, the problem of cultural dislocation as it affects every sphere of African modern life, including her jurisprudence, is defined by Uroh as:

> *a disorientation or better still, a delinking of a people from their heritage in arts, sciences, politics, social norms, religion and so on. Such culturally dislocated person finds it difficult to have a full grasp of the social realities around him or her. To lose ones culture is therefore like losing memory. This is the situation, which most Africans find themselves today... the African today is caught between a past s/he cannot recall, a present s/he is ill-equipped to understand and a future, s/he cannot contemplate.*[29]

[28] Murungi, J 'The Question of an African Jurisprudence: Some Hermeneutics Reflections' Wiredu, K (ed) 2004 *A Companion to African Philosophy*, Malden Massachusetts: Blackwell Publishing 521.
[29] Uroh, CO 'Beyond Ethnicity: The Crisis of the State and Regime Legitimation in Africa' Oladipo, O (ed) (1998) *Remaking Africa: Challenges of the Twenty-First Century* Edited by O. Oladipo, Ibadan: Hope Publications 94

In very clear terms, then colonial jurisprudence constituted one of the several burdens and challenges on African jurisprudence and its path to articulated, systemic and systematic progress. One of the critical failures of the modern state in Africa is the existence and perpetuity of a borrowed jurisprudence via the instrument of colonialism. To this end, it was bound to undermine the articulation and establishment of what is likely to emerge as the canons and status of an authentic African jurisprudence. Thus, one of the challenges of contemporary African jurisprudence is the present problematic crisis of the African state.

5.2.2.2 AFRICAN JURISPRUDENCE AND THE CHALLENGES OF GLOBALISATION AND DEMOCRATISATION IN AFRICA

An equally formidable challenge on the prospect of African jurisprudence in post-colonial Africa is centred on the rising wave of globalisation and the interest in global democratisation. As twin concepts, globalisation and democratisation have very telling effects on the texture of African jurisprudence. Presently, there is a renewed interest in the globalization of democracy and of the democratization process in the world. In most cases, it is often clear that an entitlement to the distribution of international resources is often attached to the acceptance of the duty of democratization i.e. the obligation towards democratic government. In fact, development analysts have pointed out that the notion of development starts, in most cases, with the level of space allowed for democratic rights, culture, values and ideals.

Hence, there seem to be a very close and friendly partnership and alliance between globalization as a developing phenomenon and the contemporary desire towards democratization. In less pretentious terms, globalization has afforded the space for the renewed interests in the idea of democratization. Given this, it is rather obvious that the impact of globalization on African conception of law and the working

and dynamics of law is necessitated through its twin sister concept of democratization.

Inherent in the notion of globalisation is its twin sister concept of democratisation. Donor agencies and givers of international aids tie the reception of such aids to the promise of democratisation. Given this, the globalisation of democratisation places side by side traditional and cultural ideas with modern values. This result in the conflict of value systems such as enlightened value system versus conventional value system, local values versus global values, traditional value system versus values of modernity etc. To this extent, such conflicts compel a redefinition or reconstruction of African value system or thoughts in the area of African law or jurisprudence.

The democratic ferment began spreading across the continents of Africa, Asia and the eastern part of Europe since 1989. The spread was occasioned primarily, but not in the major sense, by the breakdown and collapse of Socialism/Communism in the former Soviet Union and in Eastern Europe, and of the failure of One party and military rule in Asia and Africa. According to Larry Diamond, "never in human history have so many independent countries been demanding or installing or practising democratic governance. Never in history has awareness of popular struggles for democracy spread so rapidly and widely across national borders. Never have democrats world-wide seemed to have so much cause for rejoicing."[30]

As demands for democracy have swept across the continent of Africa since 1989, dramatic change has affected states in sub- Saharan Africa. Frustrated by declining economies and the failures of incumbent governments, people from many different social strata have called for an end to authoritarian rule. In recent transitions, opines Catherine

[30] Larry Diamond, "Three Paradoxes of Democracy" in *Journal of Democracy*, Summer 1990, Vol. 1, No. 3, p. 48.

Newbury, the most vocal opponents to authoritarian rule are the urban middle classes with a cry for the establishment of a formal democracy.[31]

According to Fatton, " the democratic project or the process of redemocratising African politics is ... becoming the hegemonic issue in African studies, not only because of a thematic/and moral search for an alternative to the existing authoritarian predicament, but also because there are indications that peasants, workers, and intellectuals of Africa are no longer prepared to put up with being victims of despotic regimes[32].

But then, globalization as a developing phenomenon is not new. It has its own dramatic impact on the nature of jurisprudence even in the West. Hence, the impact of globalization is not on democracy and the process of democratization alone. Important is its impact on what is to emerge as a proper conception of jurisprudence. Evidently, globalization is tied to the doctrine of world democratization in a positive way. However, its connection with the concept of jurisprudence and the nature of national legal systems is in one form or the other negative. It is negative in the sense that globalization of economic, political forces, and even moral ideas and values, in one way or the other, poses a great challenge to the idea of national jurisprudence in nation-states of the world, especially Africa. As such the jurisprudential framework adopted by states of the world, especially dependent ones, have generally lacked cultural authenticity.

From a global perspective, in the important sense, nation-states are part of the global, capitalist order that keeps increasing both in power and resources. This part is often defined in terms of the logic of dependence. The legal, political and economic

[31] Catherine Newbury, "Introduction: Paradoxes of Democratization in Africa" in *African Studies Review*, Vol. 37, No. 1, p. 1-3.
[32] Robert Fatton, Jr. "Liberal Democracy in Africa" in *Political Science Quarterly*, Vol. 105, No. 3, 1990, pp: 455-56.

structure of each state is itself determined by the country's position in the capitalist order. Therefore, the success of both old and new states is constituted by dependence on the country's position in the world economy for their development. One vital mechanism for the achievement of this kind of development by new states in this capitalist scheme is the total overhauling, total modification of the laws in favour of the new order. In other words, part of the demand for economic reform and change is that of legal and jurisprudential change. New laws and legal frameworks are needed to support the changes in the economic and political spheres.

In this sense, globalisation as a dominant strategy in international politics not only changes the face of state participation in the economic and political world order but also changes the face of the legal values and framework within those states. What it does is to change the focus of authority and claims away from nation-states in which those systems are established originally to a new centre of legal authority as determined and defined by the emerging global world and its jurisprudence. What was conceived to be part of the jurisprudence of such states end up being challenged by the principles and values of operation inherent in the emerging world order in as much as those states are subservient and dependent on this order for survival. In other words, the end result is the manifestation of shifting concerns on jurisprudential notions because of allegiance of states to a New World Order.

In ironic forms, even though globalization is projected to be interested in the evolution of global jurisprudence, the effect on the notion of law and legal concepts and values, ideas and ideals in modern states such as in Africa becomes curious. Its interests in jurisprudence, and African jurisprudence for that matter, are of a different sort. The overall effect of globalization on jurisprudential concepts and systems generally, and on African jurisprudential framework in particular, consists in

the view that the dominance of cosmopolitan agents and cities poses serious challenges to the sovereignty principle in the nation-states of Africa.

In a complex relay of events, nation-states withdraw from the understanding of their citizens certain notions of laws and legal rights and privileges and instead impose new obligations on them through the enactments of certain laws which end up intensifying tensions within such states where certain rights and privileges have been taken for granted. In other words, it leads to the enactments of new laws in compliance with the New Order while it abrogates or classifies as moribund the old enabling laws.

Therefore, clearly, it is not out of place to contend at the outset that globalization has in its wake a transformation of not just the legal systems of nation-states but also the emergence of a new dimension of jurisprudence on the international scene. Even though the idea is more or less associated with what Eric Hobsbawm calls the global entity, a single economic unit[33], it must be realized that globalization is not restricted to the economic scene alone.

As a matter of fact, globalization is encroaching on received notions and understanding in the areas of information technology, bioethics, human rights, citizenship, politics, culture, identities, law, sports and a whole lot of the gamut of daily life. As an historical process, it carries along with it the entire sphere of historical meaning attached to existent values.

Ordinarily, globalization stands for the view that the world is a global village. This is what the Washington Post described as the *death of distance*. [34] Furthermore, it elicits the growing tendency towards the universalization and universal homogenization of ideas, values and even life styles. It depicts the emergence of a

[33]Hobsbawm, E (2000) *The New Century*, Great Britain: Abacus, p. 61.
[34] See *The Washington Post*, "Africa Abandoned by the West" in Guardian Weekly, May 18-24, 2000, p. 27.

New World Order in almost every realm of human knowledge production - arts, humanities, ethics, religion, technology, law etc. Commenting on the conceptual and practical dimension of globalization, McGrew posits that globalization refers to:

> *The multiplicity of linkages and interconnections that transcend the nation-state which make up the modern world system. It defines a process through which events, decisions and activities in one part of the world can come to have significant consequences for individuals and communities in quite distant parts of the globe.*[35]

How then do we conceptualize globalization? According to Francis Fukuyama, globalization could be seen as a systematic process to universalize liberal orthodoxy. The central ideas of liberal orthodoxy are liberal democracy and economic liberalism.[36] Based on Fukuyama's analysis, two central objectives appear relevant intestinal to the globalization process as advocated and propagated in the West. These are: the domination of the world, and a covert and perpetual hold on the advancement of the developing world, especially Africa.

What, then, is the significance of these debates on the boundaries of contemporary African jurisprudence? In the significant sense, the conceptual approaches outlined above on the impact of globalisation on African jurisprudence lead the view that what Africans conceive law to be or the body of thoughts regarded as law is involved in a form of re-interpretation and re-invention. Thus, what globalisation has done, in the primary sense, is providing the conceptual and practical media for assessing the basis and contours of African jurisprudence. As a matter of fact, the jurisprudence of a country or state is significant in enabling its citizens guard and guide their lives in the light of the enormity of state power. Where states in question have implicitly submitted their state sovereignty to a globalising foreign power, it is to be expected that such a state has only succeeded in exposing its

---

[35] McGrew, T 'A Global Society' Hall, S, Held, D and McGrew, T (eds.) *Modernity and its Futures* Cambridge: Polity Press, 1992, pp: 13-14.
[36] Fukuyama, F *The End of History and the Last Man* London: Penguin, 1992, p. 48.

population to a foreign influence. The kind of jurisprudence that exists in a given polity suggests clearly the kinds of political, social and economic rights that will not only exist in that state but that will also be freely guaranteed and safeguarded.

In Ghana and Nigeria, for instance, there is a consciousness towards allowing traditional rulers a place in the formation of laws apart from the dramatic influence that these traditional rulers have in the day to day legal administration of their people. In February 11, 1999, Nana Akuoko Sarpong, the Presidential Aide on Chieftaincy Affairs and Chairman of the National Commission on Culture, spoke in ardent terms on the relevance of the Chiefs in the entire Ghanaian political life and system. In the view of Nana Akuoko Sarpong, for instance, the relevance of the Chiefs in the entire Ghanaian political life and system is immense and uncompromisable. In his words,

> *The Chiefs are at the centre of the political process. Involvement of Chiefs in party politics is, however, not allowed constitutionally although the idea of involvement is not actually defined. The Chiefs are the first point of contact when the society is in trouble. The Chiefs are the shock absorbers. Ghanaian everyday life revolves around and relies on tradition which is the domain of the Chiefs.*[37]

It is also very tempting to hold the view that in the normal day-to-day routine of public life, inhabitants of several communities in Nigeria rather than going to modern law courts now take their cases to traditional courts where traditional rulers and their representatives adjudicate. Many reasons account for this. One is the long standing reason that there is the absence of true justice in modern courts. Again, the fact that court procedures and processes take longer time than usual has made the local populace to abandon modern courts. Another is the fact that many people cannot afford the huge expenses involved in going to modern courts.

---

[37] Nana Arkuoko Sarpong, 1999, "The Ghana House of Chiefs: Its Relevance in the Evolution of National Culture and Identity" before a group of scholars, on the programme ***Transcending Boundaries: The Humanities and Socio-Economic Transformation in the African World***, on the theme ***National Culture and Identity in Africa: The Relevance of Philosophy***, at the African Humanities Institute, University of Ghana, Legon, Accra, Ghana.

These examples only show the fact that African jurisprudence, in an age of globalisation, is not done with yet. It is still true that the whole body of thoughts on African law, especially in its contact with the global world, is inviting some re-interpretation and reconstruction. But then, it still behoves one to assert that African jurisprudence i.e. African theory of law is symbolised in the ideals of reconciliation, conciliation, restorative justice and consensus rather than an adversarial attitude. It is also symbolised in collectivism or communitarianism rather than individualism or what C. K. Anyanwu branded as "psychic dissociation"[38] in the society. The close linkage between canons of law and justice, that is, allowing moral values to influence and regulate legal values, is still relevant for Africa since it is of Africans, by Africans and for Africans.

[38] C. K. Anyanwu, "African Political Doctrine" in *African Philosophy*, E. A. Rush and C. K. Anyanwu, (eds), Rome, Catholic Book Agency, 1984, p. 375.

BIBLIOGRAPHY

BOOKS

Abeles, E. (ed.) *National Encyclopedia*, Washington, D.C.: Education Enterprises, Incorporation, 1963.

Abimbola, W. "The Place of Ifa in Yoruba Traditional Religion" *African Notes* Vol. 2, Jan., 1965.

Abraham, J. H. *Sociology: A Historical and Contemporary Outline*, London: Holder and Stoughton 2nd edition, 1975.

Abraham, W. E. *The Mind of Africa*, Chicago: University Of Chicago Press, 1962

Acton, H. B. "Tradition and Some other Forms of Order" in *Proceedings of the Aristotelian Order*, n.s., vol. 53, 1952/3.

Adaramola Funso, *Basic Jurisprudence*, chp. 5, Ilorin: Rahmat Printing Investments, 1995.

Adeoti, G. R. "Canonising the Hole in Africa's Postcolonial Zero: An Exploration of the Dramaturgy of Kole Omotoso", paper presented at the Codesria African Humanities Institute's International Symposium on the theme *Canonical Works and Continuing Innovation in African Arts and Humanities*, University of Ghana, Legon, Sept. 17-19, 2003.

Adewoye, O. *The Judicial System in Southern Nigeria, 1854-1954*, London: Longman, 1977.

Ajisafe- Moore, E. A. *The Law and the Customs of the Yoruba People*, Abeokuta, No Date.

Akinjogbin, A. I. "The Ebi System Reconsidered" in *Department of History University of Ife Seminar Series 1978-1979*, pp. 1-25, Ile-Ife: Kosalabaro Press, 1979.

Akinjogbin, A. I. *Dahomey and its Neighbours, 1708-1818*, Cambridge: Cambridge University Press, 1967.

Alade, C. A. "Aspects of Yoruba Culture in the Diaspora" in *Culture and Society in Yorubaland*, edited by D. Ogunremi and A. Adediran, pp. 203-211, Ibadan: Rex Charles Publication, 1998.

Allot, A. *Essays in African Law with Special Reference to the Law of Ghana*, London, Butterworths, 1960.

Allot, A. *The Future of Law in Africa*, London, Butterworths, 1960.

Allot, A. *The Limits of Law*, London, Butterworths, 1980.

Allot, A. & Cotran, E. *Integration of Customary and Modern Legal Systems in Africa*, Ife, 1971

Anyanwu, C. K. "African Political Doctrine" in *African Philosophy*, E. A. Ruch and C. K. Anyanwu, (eds), Rome, 1984.

Appiah, K. A. *In My Father's House: Africa in the Philosophy of Culture* London: Methuen, 1992.

Anyebe, A. P. *Customary Law, The War Without Arms*, Enugu, 1985.

Aquinas, T. "Law as the Ordinance of Reason" in *The Nature of Law* in M.P. Golding, pp. 9-24, New York: Random House, Inc., 1966.

Aristotle's *Nicomachean Ethics*, Trans. by Terence Irwin, Indianapolis, Indiana: Hackett Publishing Co., 1985.

Asiwaju A. I. "Law in African Borderlands: The Lived Experience of the Yoruba Astride the Nigeria-Dahomey Border" in Kristin Mann and Richard Roberts (ed.) *Law In Colonial Africa*, pp. 224-238, Portsmouth, NH: Heinemann Educational Books, Inc., 1991.

Austin, J. "Law as the Sovereign's Command" in *The Nature of Law*, M. P. Golding (ed), pp. 77-98, New York: Random House, 1966.

Awolowo, Obafemi *Path to Nigerian Freedom*, London: Faber and Faber, 1947.

Azarya, Victor "Reordering State-Society Relations: Incorporation and Disengagement" In *The Precarious Balance: State and Society in Africa* eds. Donald Rothchild and Naomi Chazan, Colorado: Westview Press, 1988.

Bascom, W. *The Yoruba of Southwestern Nigeria.* New York: Longman, 1969.

Beier, U. *The Return of the Gods. The Sacred Art of Susan Wenger*. Cambridge: Cambridge University Press, 1973.

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

Bentham, Jeremy. "Anarchical Fallacies." In *The Works of Jeremy Bentham*. Edited by John Bowring. Vol. 2., pp. 491-501, Edinburgh: William Tait, 1843, pp. 491-501.

Bentham, Jeremy *An Introduction to the Principles of Morals and Legislation*, Garden City: Doubleday, 1935.

Bentham, J. *Theory of Legislation*, New York: Oceana Publications Inc., 1975.

Bentham, J. *Of Laws in General*, ed. HLA Hart Charles Warren Everett), New York: Columbia. University Press, 1945

Berger and Luckmann, *The Social Construction of Reality : A Treatise on the Sociology of Knowledge*, Garden City, New York: Anchor Books, 1966.

Bix, B. "Legal Positivism" in *The Blackwell Guide to the Philosophy of Law and Legal Theory*, pp. 29-49, Malden, Massachusetts: Blackwell Publishing Limited, 2005.

Bix, B. "Natural law Theory" in *A Companion to Philosophy of Law and Legal Theory*, Dennis Patterson (ed.), pp. 223-240, Oxford: Blackwell, 1996.

Bix, B. *Jurisprudence: Theory and Context*, 2nd ed., London: Sweet & Maxwell/Carolina Academic Press, 1999.

Bloom Cooper and Drewry, G. *Law and Morality*, London: Duckworth Publishers, 1976.

Bobbio, N. *Legal Positivism (Il Postivsmo Giuridico)*, Turin: Giapichelli, 1961.

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

Chabal, J. *Power in Africa An Essay in Political Interpretation*, 1994.

Cahn, E. *The Moral Decision: Right and Wrong in the light of American Law*, Bloomington: Indiana University Press, 1955.

Campbell, T. *The Legal Theory of Ethical Positivism*, Aldershot: Dartmouth Publishing Co. Ltd., 1996.

Carroll, K. *Yoruba Religious Carving* (Pagan & Christian Sculpture in Nigeria & Dahomey). London: Longman, 1967.

Chanock, M. *Law, Custom and Social Order. The Colonial Experience in Malawi and Zambia*, Cambridge: Cambridge University Press, 1985.

Coleman, J. "Authority and Reason" in *Autonomy of Law Essays on Legal Positivism* ed. Robert P. George, pp. 287-319, Oxford: Clarendon Press, 1996.

Coleman, J. *The Practice of Principle: In Defence of a Pragmatist Approach to Legal Theory*, Oxford: Oxford University Press, 2001.

Collingwood, R. G. *An Essay on Metaphysics*, Oxford: Oxford University Press, 1940.

Cotterell, R. *The Politics of Jurisprudence - A Critical Introduction to Legal Philosophy*, London: Butterworths, 1989.

d'Entreves, A. P. "Three Conceptions of Natural Law" in M. P. Golding, (ed.), pp. 35-52, New York: Random House, 1966.

D'Entreves, A. P. *Natural Law*, London: Hutchinson, 1970.

Dahlman, C. "Adjudicative and Epistemic Recognition", *Analisi e diritto 2004*, a cura di P. Comanducci e R. Guastini.

De Mulder, R. and dr. Kees van Noortwijk "More science than art: Law in the 21st century," presented at the 12th BILETA Conference on *The Future of Legal Education and Practice*, Monday, March 24th & Tuesday, March 25th, 1997, Collingwood College, University of Durham, http://www.bileta.ac.uk/97papers/97-7.html.

Delafosse, *Negroes of Africa*, Washington, DC: Associated Publishers Inc., 1931.

Delamotte, E. C., Meeker, N., and O'Barr, J.F. *Women Imagine Change: A Global Anthology of Women's Resistance from 600 B.C.E. to Present* New York: Routledge, 1997.

Devlin, P. "Morals and the Criminal Law," in *Philosophy of* Law, R. Dworkin (ed.), London: Oxford University Press, 1977.

Dias, R.W.M. *Jurisprudence*, London: Butterworths and Co. Publishers Ltd., 1985.

Diop, C. A. *Civilisation or Barbarism: An Authentic Anthropology*, Brooklyn: Lawrence Hill Books, 1991

Dubois, W. E. B. "The Conservation of Races" in Albert Mosley, ed., *African Philosophy: Selected Readings*, (Englewood Cliffs, NJ: Prentice Hall, 1995.

Durant, W. *Our Oriental Heritage*, New York: Simon and Schuster, 1954.

Dworkin, R. "Indeterminacy and Law" in *Positivism Today*, pp. 1-9, Aldershot: Dartmouth Publishing Co. Ltd., 1996.

Dworkin, R. *Taking Rights Seriously*, 2d ed., Cambridge: Harvard University Press, 1978.

Dworkin, R.M. (ed.) *Oxford Readings in Philosophy. Philosophy of Law*, Oxford: Oxford University Press, 1977.

Elegido, J. M. *Jurisprudence*, Ibadan: Spectrum Books Limited, 1994.

Elias, T. O. "Towards a Common Law in Nigeria" in *Law and Social Change in Nigeria*, Lagos, 1972.

Elias, T. O. *Government and Politics in Africa*, 1963.

Elias, T. O. *The Impact of English Law on Nigerian Customary Law*, Lagos: Ministry of Education, 1958.

Elias, T. O. *The Nature of African Customary Law*, Manchester: Manchester University Press, 1956.

Evans-Pritchard, *The Nuer of Southern Sudan*, Oxford: Clarendon Press, 1940.

Eze, Emmanuel Chukwudi, ed. *African Philosophy: An Anthology*, Cambridge, Massachusetts: Blackwell, 1997.

Ferguson, J. "Aspects of Early Christianity in North Africa" in Lloyd A. Thompson and J. Ferguson, eds., *Africa in Classical Antiquity, Nine Studies*, Ibadan, Nigeria: Ibadan University Press, 1969.

Finch, *Introduction to Legal Theory*, 2nd Edition, London: Sweet and Maxwell, 1974.

Finnis, *Natural Law and Natural Rights*, Oxford: Clarendon Press, 1980.

Fleischacker, S. *The Ethics of Culture*, Ithaca: Cornell University Press, 1994.

Foote, A. H. *Africa and the American Flag*, New York, 1854.

Forbes, D. *Hume's Philosophical Politics*, Cambridge: Cambridge University Press, 1975.

Fraser, N. and Linda Nicholson, "Social Criticism without Philosophy: An Encounter between Feminism and Postmodernism" in *Feminist Social Thought: A Reader*, edited by Diana Meyers, pp. New York: Routledge, 1997.

Freeman, *Lloyd's Introduction to Jurisprudence*, London: Sweet and Maxwell, 1994.

Friedmann, W. "Legal Theory" in *Chamber's Encyclopaedia*, New Revised edition, Vol. VIII, London: International Learning Systems Corporation Limited, 1969.

Friedmann, W. G. *Chamber's Encyclopaedia* New Revised Edition, Vol. 8, London: International Learning Systems Corporation Limited, 1969.

Friedrich, C.J. *The Philosophy of Law in Historical Perspective*, Chicago: University of Chicago Press, 1963.

Fukuyama, F *The End of History and the Last Man* London: Penguin, 1992.

Fuller, L. *The Morality of Law*, Connecticut: Yale University Press, 1964.

Füßer, K. 'Farewell to Legal Positivism' in R.P. George, ed., *The Autonomy of Law: Essays on Legal Positivism*, Oxford: Clarendon Press, 1996.

Gluckman, M. "Natural Justice in African Law" in *Legal Cultures*, Varga C. (ed.), 1992.

Gluckman, M. *Judicial Process among the Barotse*, Manchester: Manchester University Press, 1967.

Gluckman, M. *Order and Rebellion in Tribal Africa* chap. 7, London: Cohen and West, 1963.

Green, Leslie, "Legal Positivism", *The Stanford Encyclopaedia of Philosophy (Spring 2003 Edition)*, Edward N. Zalta (ed.), URL = <http://plato.stanford.edu/archives/spr2003/entries/legal-positivism/>.

Greenawalt, Kent. "Too Thin and Too Rich: Distinguishing Features of Legal Positivism", in Robert P. George (ed.), *The Anatomy of Law: Essays on Legal Positivism*, pp. 1-29, Oxford: Clarendon Press, 1996.

Gulliver, A. G. *Social Control in an African Society: A Study of the Arusha Declaration*, London: Routledge and Kegan Paul, 1963.

Gyekye, K. *An Essay on African Philosophical Thought: The Akan Conceptual Scheme*, Cambridge: Cambridge University Press, 1987.

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

Hall, J. *Foundations of Jurisprudence*, Oxford: Oxford University Press, 1973.

Hall, Norman & Hall, Lucia "Science and Religion are Opponents" in *Science and Religion: Opposing Viewpoints*, Rohr, Janelle, (ed.), San Diego: Greenhaven Press, Inc., 1988, pp. 59-64.

Hallberg, R. *Theory as Resistance, Politics and Culture after First Structuralism*, New York: The Guilford Press, 1994.

Hallgren, R. *The Good Things of Life. A Study of the Traditional Religious Culture of the Yoruba People*. Loberod: Plus Ultra, 1988.

Halpin, A. *Thirty Years off the Point: The Methodology of Jurisprudence*, Oxford: Hart, Oxford, 2005.

Harris, J. W. *Legal Philosophies* London: Buttersworth and Co. Publishers, 1980.

Hart, H. L. A. *The Concept of Law*, 2nd edition, Oxford: Clarendon Press, 1994.

Hart, H. L. A. "Immorality and Treason" in *Individual and Freedom: Mill's Liberty in Retrospect*, edited by D. Spitz, New York: W. W. Norton and Co., 1971.

Hart, H. L. A. *Law, Liberty and Morality*, New York: Random House Inc., 1963.

Hart, H.L.A. "Legal and Moral Obligation" in A.I. Melden (ed.) *Essays in Moral Philosophy*, Seattle: University of Washington Press, 1958.

Hart, H.L.A. "Obligation and Coercion" in *The Nature of Law* by M.P. Golding (ed.), pp. 104-107, New York: Random House, 1966.

Hart, H.L.A. *The Concept of Law* Oxford: Clarendon Press, 1961.

Hart's "Comment on Dworkin" in *Issues in Contemporary Legal Philosophy*, Oxford Clarendon Press, 1987.

Hart, H. *"The Aims of the Criminal Law" in Law and Contemporary Problems* vol. 23, 1958.

Hartland, E. S. *Primitive Law*, London: Methuen, 1924.

Hegel, G. W. F. *The Philosophy of History*, trans. J. Sibree, New York: Dover, 1956.

Herzog, F. F. *The American Peoples Encyclopaedia*, vol. 11, New York: Grolier Incorporated, 1962.

Hirshberg, R. L. *The Encyclopaedia Americana* vol. 16, New York; Grolier Incorporated, 1993.

Hobbes, Thomas "Leviathan" in *The English Philosophers from Bacon to Mill*, edited by Edwin Burtt, New York: Random House, Inc., 1939.

Hobsbawm, E. *The New Century*, Great Britain: Abacus, 2000.

Hoebel, *Law of Primitive Man*, Cambridge, Massachusetts: Harvard University Press, 1954.

Holleman, J. F. *Issues in African Law*, The Hague: Mouton and Co., 1974.

Holmes, *Collected Legal Papers*, New York: Harcourt Brace and Co., 1920.

Holmes, O. L. W. Jnr. "Law as the Prophecies of What Courts Will Do" in M. P. Golding, *op. cit.*, pp. 174-187, New York: Random House, 1966.

Holmes, O.W. *Common Law*, Cambridge, Massachusetts: Cambridge University Press, 1938.

Hountoundji, P. *African Philosophy: Myth or Reality?*, Bloomington: Indiana University Press, 1996

Hume, D. *An Inquiry Concerning Human Understanding*, Buffalo: Prometheus Books, 1988.

Hume, D. *Enquiry Concerning the Principles of Morals*, chp. 5, (ed.) Tom Beauchamp, Oxford: Oxford University Press, 1998.

Imbo, S. O. *An Introduction to African Philosophy*, Lanham: Rowman and Littlefield Publishers, 1998.

John-Stevas, *Life, Death and the Law*, Bloomington: Indiana University Press, 1961.

Jones, R.W. *Orisa Oko, the Yoruba Goddess of the Farm and Agriculture*. Nigeria Magazine No. 23, 1946.

Jori, M. "Legal Positivism" in *Routledge Encyclopedia of Philosophy*, Edward Craig (ed.), pp. New York: Routledge, 1998.

Joseph, R. *Democracy and Prebendal Politics in Nigeria The Rise and Fall of the Second Republic*, Ibadan: Spectrum Books Limited, 1991.

Kelly, J. M. *A Short History of Western Legal Theory*, Oxford: Oxford University Press, 1992.

Kelsen, H. *General Theory of Law and State*, Cambridge, Massachusetts: Harvard University Press, 1946

Kokole, O. "Ethnic Conflicts Versus Development in Africa: Causes and Remedies" In *Between Development and Destruction- an Enquiry into the Causes of Conflict in Post Colonial States* Luc Van De Goor, Kumar Rupesinghe and Paul Sciarone, pp: 126-40, The Netherlands Ministry of Foreign Affairs and Netherlands Institute of International Relations, 1996.

Kramer, M. "Legal and Moral Obligation" in *The Blackwell Guide to the Philosophy of Law and Legal Theory*, pp. 179-190, Malden, Massachusetts: Blackwell Publishing Limited, 2005.

Kwasi Wiredu, (Ed.) *A Companion to African Philosophy*, Malden Massachusetts: Blackwell Publishing Limited, 2004.

Lambert, H. E. *Kikuyu Social and Political Institutions*, London: Published for the International African Institute by the Oxford University Press, 1956.

Laski, H. *A Grammar of Politics*, London: Allen and Unwin, 5th Edition, 1952.

Law, R. *The Oyo Empire c. 1600 - c. 1836*. Oxford: Clarendon Press, 1977.

Leiter, B. "Naturalism in Legal Philosophy" in *Stanford Encyclopedia of Philosophy*, Stanford: Stanford University Press, 2004.

Lewis, I. M. "Tribal Society" in *Encyclopedia of the Social Sciences*, New York: Macmillan and Free, 1968.

M'Baye K. "The African Conception of Law" in *The Legal Systems of the World and their Common Comparison and Unification*, International Association of Legal Science Vol. II, 1975.

MacCormick, N. "Natural Law and the Separation of Law and Morals" in *Natural Law Theory Contemporary Essays*, edited by Robert P. George, pp. 105-133, Oxford: Clarendon Press, 1992.

MacCormick, N. *Legal Reasoning and Legal Theory*, Oxford: Oxford University Press, 1978.

Mackinnon, C. "Feminism, Marxism, Method, and the State: An Agenda for Theory" In *Feminist Social Thought: A Reader*, Meyers D.T. (ed.) New York: Routledge, 1997.

Maine, H. (Sir) *Lectures on the Early History of Institutions*, London: John Murray, 1914.

Malinowski, Bronislaw *Crime and Custom in a Savage Society*, London: Kegan Paul, 1926.

Mann, K. and Richard Roberts (ed.) *Law in Colonial Africa*, Portsmouth, NH: Heinemann Educational Books, Inc., 1991.

Marmor, A. "On the Nature of Law" in *Stanford Encyclopaedia of Philosophy*, (on-line) 2001.

Marmor, A. "The Pure Theory of Law" in *Stanford Encyclopaedia of Philosophy*, E. N. Zalta(ed.), http://plato.stanford.edu/archives/win2002/entries/lawphil.theory , 2002.

Masolo, D. A. *African Philosophy in Search of Identity*, Bloomington: Indiana University Press, 1994

Mbiti, J. *African Religions and Philosophy*, Garden City, N. Y. Doubleday, 1969.

McDowell, J. 'Values and Secondary Qualities' in *Morality and Objectivity*, Ted Honderich (ed.), pp. 110-129, London: Routledge & Kegan Paul, 1985.

McGrew T., "A Global Society" in S. Hall, D. Held and T. McGrew (eds.) *Modernity and its Futures*, Cambridge: Polity Press, 1992.

Meek, C. K. *A Sudanese Kingdom*, London: Kegan and Paul, 1931.

Miliband, R. *The State in Capitalist Societies*, London: Quarter Books, 1973.

Mill, J. S. "Of Society and the Individual" in *Individual and Freedom: Mill's Liberty in Retrospect*, D. Spitz (ed.), Chapter Four, New York: W. W. Norton and Co., 1971.

Mill, J. S. "On Liberty" in *The English Philosophers from Bacon to Mill*, edited with an introduction by Edwin A. Burtt, New York: Random House, Inc. published for the Modern Library, 1939.

Minogue, W. R. *The Liberal Mind*, London: Methuen, 1963.

Mitchell, B. *Law, Morality and Religion*, New York: Charles Scribner's Sons, 1967

Moreso, Jose Juan "In Defense of Inclusive Legal Positivism" in Paolo Comanducci and Riccardo Guastini (eds.), *Analisi e Diritto 1998. Ricerche di giurisprudenza analitica*.

Mudimbe, V. Y. *The Invention of Africa: Gnosis, Philosophy, and the Order of Knowledge*, Bloomington: Indiana University Press, 1988.

Murungi, John "The Question of African Jurisprudence: Some Hermeneutic Reflections" in *A Companion to African Philosophy*, Edited by Kwasi Wiredu, pp. 519-526, Malden Massachusetts: Blackwell Publishing Limited, 2004.

Nwabueze, B. *Democratisation*. Ibadan: Spectrum Books Limited, 1993.

Nino, C. S. *The Ethics of Human Rights*, Oxford: Oxford University Press, 1991.

Nnoli, *Ethnicity and Development in Nigeria,* Aldershot: Avebury Ashgate publishing limited, 1995.

Obenga, T. "Egypt: Ancient History of African Philosophy" in Kwasi Wiredu, ed., *A Companion to African Philosophy*, Malden, MA: Blackwell Publishing, 2004.

Oke, M. "Contextualism" in *A Critical Study of the Viability of Phenomenalism as an Alternative Theory of Perception* (Unpublished) PhD (Philosophy) Thesis, Ile-Ife: Obafemi Awolowo University, Ile-Ife, 1990.

Oke, M. *The Nature of Political Concepts and ideologies*, Ibadan: Hope Publications, 2001.

Okere, Theophilus *African Philosophy: A Historico-Hermeneutical Investigation of the Condition of its Possibility*, New York: University Press of America, 1983.

Oladipo, O. "Religion in African Culture: Some Conceptual Issues" in Kwasi Wiredu, (Ed.) *A Companion to African Philosophy*, pp. 355-363, Malden Massachusetts: Blackwell Publishing Limited, 2004.

Olaniyan, R. A. and Adebayo, A. G. "Yoruba Inter Group Relations and Diplomacy" in *Culture and Society in Yorubaland,* edited by D. Ogunremi and A. Adediran, pp. 97-112, Ibadan: Rex Charles Publication, 1998.

Onwuejeogwu, M. A. *The Social Anthropology of Africa,* Ibadan: Heinemann Educational Books, 1992.

Opata, D. "Gender and Canon Formation in Nigerian Literature in English: A Search for a Useable Past" paper presented at the Codesria African Humanities Institute's International Symposium on the theme *Canonical Works and Continuing Innovation in African Arts and Humanities,* University of Ghana, Legon, Sept. 17-19, 2003.

Opeloye, M. O. "Evolution of Religious Culture among the Yoruba" in *Culture and Society in Yorubaland*, edited by D. Ogunremi and A. Adediran, pp. 139-148, Ibadan: Rex Charles Publication, 1998.

Opoku, K. A. *West African Traditional Religion*, Accra: FEP International Private Limited, 1978.

Oruka, H. O. "Sagacity in African Philosophy," in *African Philosophy: The Essential Readings*, ed. Tsenay Serequeberhan, New York: Paragon House, 1991.

Oruka, O. *Sage Philosophy: Indigenous Thinkers and Modern Debate on African Philosophy*, Leiden: E. J. Brill, 1990

Paton, W. G. *Jurisprudence*, Oxford: Clarendon Press, 1972.

Peel, J. D. Y. *Aladura: A Religious Movement among the Yoruba*. Oxford: Oxford University Press, 1968.

Pekka Seppala, *The History and Future of the Customary Law in Kenya*, Occasional Papers 13, Helsinki: Institute of Development Studies, University of Helsinki, 1991.

Plamenatz, J. *The English Utilitarians*, Oxford: Oxford University Press, 1949.

Posner, R. *The Problems of Jurisprudence*, Cambridge, Massachusetts: Harvard University Press, 1991.

Pospisil, *The Anthropology of Law*, New York: Harper and Row Press, 1971.

Pound, R. *Interpretations of Legal History*, New York: Macmillan, 1923.

Pozzolo, S. 'Riflessioni su *inclusive* e *soft positivism*' in Paolo Comanducci and Riccardo Guastini (eds.), *Analisi e Diritto 1998. Ricerche di giurisprudenza analitica.*

Price, J. H. *Comparative Government*, Hutchinson Press, 1979.

Radin, P *The World of Primitive Man* New York: Grove Press Publication, 1953.

Raz, J. *Ethics in the Public Domain*, Oxford: Clarendon Press, 1994.

Raz, J. *Practical Reasons and Norms*, London: Hutchinson, 1975.

Raz, J. *The Authority of Law, Essays in Law and Morality*, Oxford: Clarendon Press, 1979.

Raz, J. *The Morality of Freedom*, Oxford: Oxford University Press, 1994.

Report of the Committee on Homosexual Offences and Prostitution, London, 1957, Her Majesty's Stationery Office, cmnd. 247.

Riddall, J. G. *Jurisprudence*, London: Butterworths, 1991.

Roberts, R. and Mann, K. "Law in Colonial Africa" in *Law in Colonial Africa*, edited by Roberts, R. and Mann, pp. 3-58, Portsmouth, NH: Heinemann Educational Books, Inc., 1991.

Ruch, E . A. and C. K. Anyanwu, *African Philosophy*, Rome, 1984.

Russell, B. "The Problems of Philosophy", in *Classic Philosophical Questions*, James A. Gould, (ed.) 4th Edition, Oxford: Clarendon Press, 1982.

Sabine, G. H. and Thorson, T. L. *A History of Political Theory*, 4th Edition, New Delhi: Oxford and IBH Publishing Co. PVT. Ltd., 1973.

Sayed, H. A. Malik, "Shariah: A Legal System and a Way of Life" in *Perspectives in Islamic Law and Jurisprudence. Essays in Honour of Justice (Dr) Muritala Aremu Okunola (JCA)*, edited by M. Oloyede Abdul-Rahman, NAMLAS Publications, 2000.

Scanlon, T. M. "Contractualism and Utilitarianism" in *Utilitarianism and Beyond*, Sen, A. and Williams, B. (eds.), pp. 103-128, Cambridge: Cambridge University Press, 1982.

Scoular, J. "Feminist Jurisprudence" in *Contemporary Feminist Theory* edited by Stevi Jackson and Jackie Jones, Edinburgh: Edinburgh University Press, 1995.

Seagle, W *The History of Law*, New York: Tudor Publishing, 1946.

Simmons, A. J. *Moral Principles and Political Obligation*, Princeton: Princeton University Press, 1979.

Sklar, J. *Legalism*, Cambridge, Massachusetts: Harvard University Press, 1964.

Smith, J. C. *Legal Obligation* London: Athlone Press, University of London, 1976.

Smith, M. G. "Institutional and Political Conditions of Pluralism" in *Pluralism in Africa*, L. Kuper and M. G. Smith (eds.), Berkeley, Los Angeles: University of California Press, 1969.

Smith, M. G. *The Sociological Framework of Law*, Chapter 2, Kuper and Kuper, 1965.

Smith, P. "Four Themes in Feminist Legal Theory: Difference, Dominance, Domesticity, and Denial", in *The Blackwell Guide to the Philosophy of Law and Legal Theory*, edited by Golding, M. P. and Edmundson, W. A., Malden, Massachusetts: Blackwell Publishing Limited, 2005, pp. 90-104.

Sobande, A. "Eewo" in *Iwe Asa Ibile Yoruba* edited by Oludare Olajubu, Ikeja: Longman Nigeria Limited, 1978.

Sodipo, J. O. *Philosophy and Culture, Inaugural Lecture*, Ile-Ife: Ife University Press, 1973.

Solomon, R. and Kathleen M. Higgins, *A Short History of Philosophy*, New York: Oxford University Press, 1996.

Spaak, Torben "Legal Positivism and the Objectivity of Law" in *Analisi e diritto 2004*, a cura di P. Comanducci e R. Guastini,

Starr, J. and Jane F. Collier, *History and Power in the Study of Law: New Directions in the legal Anthropology*, Ithaca: Cornell University Press, 1989.

Stephen, J. F. *Liberty, Equality and Fraternity*, 2nd edition, London: John Murray, 1874.

Stone, J. *Legal Systems and Lawyers' Reasoning* California: Stanford University Press, 1964.

Stone, J. *Social Dimensions of Law and Justice*, Stanford: Stanford University Press, 1966.

Sule, Maitama "Why the North Leads." Excerpts from the translated version of Maitama Sule's Address of the launching of Isa Keita (ed) *Power and Knowledge*, on December 22, 1992.

Summers, R. S. "Notes on Criticism in Legal Philosophy" in R. S. Summers (ed.) *More Essays in Legal Philosophy General Assessment of Legal Philosophies*, Oxford: Basil Blackwell, 1971.

Taiwo, O. *Legal Naturalism - A Marxist Theory of Law*, New York: Cornell University Press, 1996.

Theodore Benditt, *Law as Rule and Principle*, England: The Harvester Press Ltd., 1978.

Trevor-Roper, H. *Rise of Christian Europe*, London: Thames and Hudson, 1964.

Tylor, E. B. *Primitive Culture*, 1871,

Twining, W. "Evidence and Legal theory" in *Legal Theory and Common Law* W. Twining (ed), 62-80, Oxford: Basil Blackwell, 1986.

Twining, W. 'General and Particular Jurisprudence' in S. Guest, ed., *Positivism Today*, Aldershot: Dartmouth, 1996.

Twinning, W. *Globalisation and Legal Theory*, London: Butterworth, 2000.

Twining, W. "Reviving General Jurisprudence" in *The Great Juristic Bazaar*, edited by M. Likosky Aldershot: Ashgate, 2003.

Twining, W. *Law in Context: Enlarging a Discipline* Oxford: Oxford University Press, 1997.

Unah, J. *Fundamental Issues in Government and Philosophy of Law*, Ikeja: Joja Press Ltd., 1993.

Vansina, Jan *Art History in Africa, An Introduction to Method*, London: Macmillan Press, 1984.

Vincent, A. *Theories of the State*, Oxford: Basil Blackwell, 1987.

Waluchow, Wilfrid *Inclusive Legal Positivism*, Oxford: Clarendon Press, 1994.

Watkins, J. H. *The Political Tradition of the West: A Study in the Development of Modern Liberalism*, Cambridge, Massachusetts: Harvard University Press, 1948.

Watson, A. *Sources of Law, Legal Change and Ambiguity*, Philadelphia: University of Philadelphia Press, 1984.

Webster's Third New International Dictionary, 1982.

Weinreb, L. *Natural Law and Justice*, Cambridge, Massachusetts: Harvard University Press, 1987.

William, W. "A Philosophical Analysis of Feminist Jurisprudence" in *Readings in Sociological Studies*, vol. II, edited by P. C. Onyia, C. Owoh and P. C. Ezeah, pp. 1-16, Enugu: Rainbow Publishers, 2002.

Williams, R. *Keywords*. London: Fontana, 1976.

Wittgenstein, L. *On Certainty*, G. E. M. Ascombe and G. Von Wright, (Trans.) (Oxford: Basil Blackwell, 1974.

Wittgenstein, L. *Philosophical Investigations*, G. E. M. Ascombe (Trans.) (New York: Macmillan, 1958.

Woozley, A. Z. *Law and Obedience*, Oxford: Clarendon Press, 1979.

JOURNAL ARTICLES

Adewoye, Omoniyi "Proverbs as Vehicles of Juristic Thought among the Yoruba" in *Obafemi Awolowo University Law Journal*, January and July 1987:1-17.

Alexy, R. "On the Necessary Relations between Law and Morality" in *Ratio Juris*, Vol. 2 No. 2 July 1989: 167-183.

Annis, D. "Contextualist Theory of Epistemic Justification" in *American Philosophical Quarterly*, Vol. 15, No. 3 (July), 1978, pp: 213-219.

Bernstein, R.J. "Prof Hart on Rules of Obligations", *Mind* vol. 73, 1964.

Bewaji, J. A. I. (2002). "Language, Culture, Science, Technology and Philosophy." *Journal on African Philosophy*: 1, 1.

Beyleveld, D. and Roger Brownsword "The Practical Difference between Natural-Law Theory and Legal Positivism", *Oxford Journal of Legal Studies*, Vol. 5, 1985.

Bix, B. "Conceptual Questions and Jurisprudence," *Legal Theory*, vol. 1, no. 4 (December 1995), 465-479.

Bohannan, P "Differing Realms of the Law" (1965) 67 *American Anthropologist*, No. 6, Part II 33.

Coleman, J. "Incorporationism, Conventionality and the Practical Difference Thesis" in *Legal Theory*, 4, (1998), 381-426.

Coleman, J. "Negative and Positive Positivism" in *Journal of Legal Studies*, 11 (1982), pp. 139-164;

Culver, K. "Leaving The Hart-Dworkin Debate" University Of Toronto Law Journal - Volume Li, Number 4, Fall 2001.

D'Amato, A. "The Moral Dilemma Of Positivism", 20 *Valparaiso University Law Review*, 43 (1985) Code A85e.

Devlin, P. "Morals and the Criminal Law" in Dworkin, R.M. (ed.) *Oxford Readings in Philosophy. Philosophy of Law*, Oxford: Oxford University Press, 1977.

Diamond, S. "The Rule of Law versus the Order of Custom" (1971) 38 *Social Research* 42 44.

Diamond, L. "Three Paradoxes of Democracy" in *Journal of Democracy*, Summer 1990, Vol. 1, No. 3.

Dlamini, M. A. "African Legal Philosophy: A Southern African View" in *Journal for Juridical Science"* 22(2): 69-8, 1997

de Sousa Santos, B. (1992) 1 *Social and Legal Studies* 131.

Driberg, J. H. "The African Conception of Law", *Journal of the African Society*, 34, 1935.

Dworkin, R. "The Model of Rules" in *University of Chicago Law Review*, 35, 1967.

Dworkin, R. "Lord Devlin and the Enforcement of Morals" in 75 *Yale Law Journal*, 1966.

Dworkin, R. "Thirty Years On", 115 *Harvard Law Review*, 1655 Coleman, 2001.

Fatton, R. Jr. "Liberal Democracy in Africa" in *Political Science Quarterly*, Vol. 105, No. 3, 1990, pp: 455-56.

Fuller, L.F. "Positivism and the Fidelity to Law - A Reply to Prof. Hart" in *Harvard Law Review*, Vol. 71 (1958): 630 - 672.

Greenawalt, K. "The Rule of Recognition and the Constitution", 85 *Michigan Law Review*, 1987.

Gluckman, M. "African Traditional Law in Historical Perspective" *Proceedings of the British Academy*, LX, 1974.

Gluckman, M. "Natural Justice in Africa" in 9 *Natural Law Forum* 25, 1964.

Hart H.L.A., Positivism and the Separation of Law and Morals, *Harvard Law Review*, vol. 71 (1957-58).

Hart, H. L. A. "Definition and Theory in Jurisprudence" (1954) 70, *Law Quarterly Review*, 37.

Hart, H.L.A. "Positivism and the Separation of Law and Morals" in *Harvard Law Review* Vol. 71 (1958).

Holmes, O. W. 1899, "Law in Science and Science in Law" 12, *Harvard Law Review*.

Honore, T." Must we Obey? Necessity as a Ground of Obligation" in *Virginia Law Review vol. 67 Feb (1981).*

Hopkins, Anthony "Property Rights and Empire Building: Britain's Annexation of Lagos, 1861", *Journal of Economic History*, 40(4), pp. 778-798.

Horton, R. "Positivism and the Internal Point of View" in *Law and Philosophy*, 17, 1998, 597-625.

Idowu, William "Feminist Epistemology of Law: A Critique of a Developing Jurisprudence" in *Ife Juris Review*, vol. 1, 2004, pp. 4-29.

Idowu, W. "African Jurisprudence and the Politics of Social History: An Inquiry into the Dilemma of Canonisation" in *Lesotho Law Journal*, Vol. 14, No. 1, 2001-2004, pp. 1-27.

Idowu, W. "African Philosophy of Law: Transcending the Boundaries between Myth and Reality" in *Africa: Myth and Realities, Enter Text On-line Journal, an Interactive Interdisciplinary e-Journal for Cultural and Historical Studies and Creative Work* http://www.brunel.ac.uk/faculty/arts/EnterText, Volume 4, No. 2 Winter, 2004, pp. 52-93

Idowu, W. "Citizenship Questions and Environmental Crisis in Niger Delta: A Critical Reflection" in *Nordic Journal of African Studies*, Vol. 11, No. 3, 2002, pp. 377-392.

Idowu, W. "Citizenship, Alienation and Conflict in Nigeria" in *Africa Development*, Vol. XXIV, Nos. 1 & 2, 1999, pp. 31-55.

Idowu, W. "Nigerian Citizenship, Gender and the Politics of Identity: The Conflict between Constitutionalism and Conventionalism" in *Brainfield Law Journal*, Vol. 1, No 2, 2004, pp. 131-145.

Idowu, W. "Social History, African Identity and the Memory Theory" (*The Anthropologist* 5.4), pp. 237-245.

Idowu, W. "The 'Bad Man' and the Law: Critical Reflections on Jurisprudence and the Inseparability Thesis" in *Abia State University Law Journal*, Vol 8, 2003, pp. 58-74.

Idowu, W. O. O. "Citizenship Status, Statehood Problems and Political Conflict: The Case of Nigeria" in *Nordic Journal of African Studies* 8(2), 1999, pp. 73-88.

Jagun, "What is Nigeria to me?" *The Guardian*, Lagos, January 24th 1994.

Leiter, B. "Realism, Hard Positivism and Conceptual Analysis", in *Legal Theory*, 4 (1998): 533-547.

Leiter, B. "The End of Empire: Dworkin and Jurisprudence in the 21st Century", 36 *Rutgers L. Journal*, 2005.

Letsas, George "H. L. A. Hart's Conception of Law" in *UCL Jurisprudence Review 2000.*

Leys, C. 'The "Overdeveloped" Colonial State: a Re-Evaluation' *Review of African Political Economy*', 5, (1976).

Loevinger, L. *Jurimetrics, The Next Step Forward*, 1949, in: Minn. Law Rev., April 1949.

Lyons, D. "Principles, Positivism, and Legal Theory" in *Yale Law Journal*, 87 (1977), 415-435.

M'Baye, K. "The African Conception of Law", *Int'l Encyclopaedia Comp. L.* 138 (1973) *Holland, Studies in International Law 152 (1898).*

MacCormick, N. "Contemporary Legal Philosophy: The Rediscovery of Practical Reason", 1983, 10 *Journal of Law and Society*, 1.

Marnham, P. "A Continent that was forgotten by the Twentieth Century" in *Independent on Sunday*, 16 September 1990, p. 20

Mohanty, Chandra T. 1984/1997. Under Western Eyes: Feminist Scholarship and Colonial Discourses, in Chandra Mohanty et al. (eds): *Third World Women and the Politics of Feminism*, Indiana University Press.

Morauta, J. "Three Separation Theses" in *Law and Philosophy*, 2004, 23: 111-135.

Morton, Eric, "Race and Racism in the Works of David Hume" (*Journal on African Philosophy* 1, 1, 2002.

Nettle, J. P. "The State as a Conceptual Variable" in *World Politics*, 20/4, 1968, pp:559-92.

Newbury, C. "Introduction: Paradoxes of Democratization in Africa" in *African Studies Review*, Vol. 37, No. 1, 1994, p. 1-3.

Nwakeze, P. C. "A Critique of Olufemi Taiwo's Criticism of Legal Positivism and African Legal Tradition" *International Philosophical Quarterly*, Vol. Xxvii, No. 1, Issue 105, (March 1987), pp. 101-105.

Okafor, F. U. "Legal Positivism and the African Legal Tradition" *International Philosophical Quarterly*, Vol. Xxiv, No. 2, Issue 94 (June 1984), pp. 157-164.

Oladosu, A. O. "Choosing a Legal Theory on Moral Grounds: An African Case for Legal Positivism," *West Africa Review*, Vol. 2, No. 2 (2001) [http://westafricareview.com]

Oruka, O. "Sagacity in African Philosophy," *International Philosophical Quarterly*, 23:4 (December 1983): 383-94.

Oyeronke, O. "Conceptualising Gender: The Eurocentric Foundations of Feminist Concepts and the Challenge of African Epistemologies" *Jenda: A Journal of Culture and African Women Studies*, http://www.jendajournal.com/jenda/vol. 2.1/toc2/1/htm>:2,1, 2002.

Paulson, Stanley L. "Classical Legal Positivism at Nuremberg", *Philosophy and Public Affairs*, vol. 4, no. 2 , Winter, 1975, pp. 130-150.

Raz, J. "Hart on Moral Rights and Legal Duties" in *Oxford Journal of Legal Studies*, 4 (1984), pp. 123-131.

Raz, J. "On the Nature of Law" in *Archiv fur Rechtsund Sozialphilosophie*, 82, 1996.

Rimmer, D. Letter to *Independent on Sunday*, 23 September 1990, p. 18.

Robert P. George "What Is Law? A Century of Arguments" First Things, Journal of Religion and Public Life, 112 (April 2001):23-29, www.FirstThings.com

Roberts, S. "Law and the Study of Social Control in Small-Scale Societies", 1976, 39 (Modern Law Review), 663.

Rogat, "The Judge as Spectator" in *University of Chicago Law Review*, 31, 1964, 213.

Shapiro, S. "On Hart's Way Out" in *Legal Theory*, 4 (1998): 469-508.

Smith, M. B. E. "Is There a Prima Facie Obligation to Obey the Law?" *Yale Law Journal* vol.82, 1973.

Soper, P. 'Two Puzzles from the Postscript', *Legal Theory*, 3, 1998.

Soper, P. "Legal Theory and the Obligation of a Judge: The Hart/Dworkin Dispute" in *Michigan Law Review*, 75 (1977), pp. 473-519.

Stocker, M. "The Schizophrenia of Modern Ethical Theories" *The Journal of Philosophy*, 73 (1976), pp. 453-465.

Taiwo, O. "Legal Positivism and the African Legal Tradition: A Reply" *International Philosophical Quarterly*, Vol. 25, No. 2, (1985), 197-200.

Taiwo, O. Exorcising Hegel's Ghost: Africa's Challenge To Philosophy, On The Theme: Religion And Philosophy In Africa, African Studies Quarterly, Vol. 1, Issue 4, 1998, <Http://Www.Clas.Ufl.Edu/Africa/Asq/Legal.Htm>

Taiwo, O. "Of Citizens and Citizenship", *The Tempo*, Lagos, Sep.-Oct. 1996, p. 16.

Teubner, G. "How the Law Thinks. Towards a Constructivist Epistemology of Law" (1989) 23 *Law and Society Review* 727-57;

The Washington Post, "Africa Abandoned by the West" in Guardian Weekly, May 18-24, 2000, p.27

Twinning, W. "The Bad Man Revisited" in 58 *Cornell Law Review*,1973, 275.

Uroh, C.O. 1998. "Beyond Ethnicity: The Crisis of the State and Regime Legitimation in Africa" In *Remaking Africa: Challenges of the Twenty-First Century* Edited by O. Oladipo, 94-105. Ibadan: Hope Publications.

Waluchow, "Authority and the Practical Difference Thesis: A Defence of Inclusive Legal Positivism" in *Legal Theory*, (2002) 6, pp. 45-82.

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

West, R. "Jurisprudence and Gender" (1988) 55 1, *University of Chicago Law Review*,1-72.

Wilson, R. "Challenging Restorative Justice" in *Human Rights Dialogue*, Series 2. No. 7, winter 2002.

West, R. "Jurisprudence and Gender" in *University of Chicago Law Review*, 1988, 55, 1.

Williams, D. "Language and the Law" in *Law Quarterly Review*, 61 (1945/6), 179.

INTERNET MATERIALS

http://www.mdx.ac.uk/www/study/sshglo.htm#Culture.

Bhamera, K. Nazi Jurisprudence is not a Surprising Outcome of German Legal Tradition - A Proposition" http://www.warwick.ac.uk/-sysdt/stl2003-m4.htm.

Manuel, T. A. "Globalisation and the African State, in *South Bulletin 78,* http://www.southcentre.org/info/southbulletin/index2.htm

Social Theory of Law, http://www.warwick.ac.uk/-sysdt/stl2003-5.htm.

Taylor, S. "Nazi Jurisprudence is an Unsurprising Outcome of German Legal Tradition - A Proposition" http://www.warwick.ac.uk/-sysdt/stl2003-m4.htm.

Waldron, J. "Can there be a Democratic Jurisprudence" http://lawweb.usc.edu/faculty/workshops/documents/Waldron.pdf.

Wikipedia, the free encyclopedia, http://en.wikipedia.org/wiki, 2005.