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## **African Philosophy of Law: Transcending the Boundaries between Myth and Reality**

### **Introduction**

It is an acknowledged fact that the literature on social history and anthropology is replete with varying and bewildering instances of the projections of Western cultural superiority and the fabulous representation of every sphere of the African possibility. These fabulous projections, apart from having their foundation in Eurocentrism, are aimed at creating negative images and stereotypes of Africans and their history.

As excellently captured by Mohanty Chandra, Eurocentrism is produced when “third world legal, economic, religious and familial structures are treated as phenomena to be judged by Western standards.... When these structures are defined as ‘underdeveloped’ or ‘developing....’”<sup>1</sup> At best, Eurocentric perceptions can be branded as political and ideological propaganda meant to denigrate and desecrate the essence and existence of African realities. Often cast in a mythical form, the African predicament is based on the specious perception that Africans have no history.

One aspect of African life that has become subject to the harassment of Eurocentrism and thus a horrendous torrent of dismal interpretations is the African conception of law (jurisprudence) and the legal systems arising therefrom. Sourced in this age-long predicament is the persistent question: is African philosophy of law (jurisprudence) a myth or reality?

The mythic representation of African realities in general and the African conception of law in particular can be seen in several dimensions. These dimensions can be reduced, essentially, to two fundamental propositions. The first represents the myth of the claim to an African past before contact with the European world. The second mythic representation of Africa borders on the claim that even if Africans claim to have a history or a past, such histories are lacking in any literary, philosophical and intellectual significance. These myths encapsulate the heart and substance of the dilemma that African jurisprudence is plagued with in a world reverberating under the influence of the globalisation of European values.

The interrogation of the reality of the African jurisprudence project will be discussed under the second mythic representation of Africa and Africans. In this sense, a perceptive reading of these myths identified in relation to the African jurisprudence project can be seen as forming a complete whole. For instance, if it is true that Africans have no history it is not farfetched to conclude that they do not have reflective systems of law and by implication it shows that there is nothing unique about the African past and reality.

A people's system and conception of law is clearly connected with and rooted in their history. Once it can be demonstrated that Africans have no history, no past before

their contact with Europe, no significant system of law and rules can be ascribed to them. And what is more, it shows that talk about the unity of African law is at best mute since in the first instance, a deliberative and recognised system of law is rooted in one's familiar history.

But then, while each of these mythic representations of this aspect of African reality are open to serious questioning and critical examination, this paper is concerned with a critical examination of the basis of the claim that the existence of a distinct sense of theorisation and conceptualisation of jurisprudence that is African and not western is a myth. The several ways in which these myths have been represented and projected constitutes the basis of the present work. In methodological forms, the paper will adopt both the expository and critical methods in advancing its position. In the light of this, the paper seeks to consider the following. In the first place, attention will be drawn to the diverse mythification of the African jurisprudence project. In the second place, the paper will also seek to consider why the African philosophy of law is considered a myth and the factors that account for this perennial perception. Thirdly, the last section is concerned with the future of the African philosophy of law (jurisprudence).

### **The Mythic Representation of African Jurisprudence**

The question whether there is an African jurisprudence or philosophy of law is not fresh. What is original however is the contemporary response to the age-old question. In addition, what is equally unique 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. Interestingly, it has a counterpart. Its counterpart in this quest for significance and relevance is the controversy over whether there exists an

African philosophy. For over three decades now, scintillating debates over the existence of African philosophy have engaged the attention of scholarship all over Africa, Europe and the Americas.

Drawing from the success of the debate over the possibility of African philosophy, African jurisprudence, which centres primarily on the reflections of scholars over the idea and theory of the realities of law in traditional and modern African societies, seems to be engrossed in the quest for pertinence in what can be called a search for the significance of its hidden history. At its heart is the view that to perceive the significance of the history of any subject or culture requires openness of mind. In fact, the significance of that history also lies very tellingly only in the memory of the storyteller.

Even though the memory of the story teller, Africans writing and telling their own history, may be a worrisome burden, it is believed that this burden only has its explanation in the view that the requirements of history are always awesome. It is in this awesomeness that African jurisprudence seeks to locate the quest for relevance. For African jurisprudence, this consists in dispelling the mythic garment cast around its very survival. Essentially, there are quite a number of myths cast around the African jurisprudence project that are not only inviting but in need of serious examination. These will be discussed seriatim.

### **Myth 1: Africans Do Not Have a History or a Past**

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 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....<sup>2</sup>

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<sup>3</sup>

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.

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.<sup>4</sup>

Furthermore, the history of Christianity, the Greco-Roman era and the African thinkers it produced, such as Origen,<sup>5</sup> 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.<sup>6</sup> 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.”<sup>7</sup>

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 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.<sup>8</sup>

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.”<sup>9</sup>

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 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, 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.<sup>10</sup> 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.<sup>11</sup> 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 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.<sup>12</sup>

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."<sup>13</sup> 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.

### **Myth 2: Africans have Little or No System of Laws before the Arrival of Europeans**

There is also the myth that Africans do not have a reflective system of laws before the arrivals of the Western powers. Without any iota of doubt, any serious scholarship on the place of law in African realities must of necessity raise questions about prevailing concepts and theoretical approaches. This results from the fact that the architecture and

furnishings of jurisprudential and legal research have been by and large distilled from European and American experiences.

This mythical representation of African life and philosophy of society has been expressed and strongly worded in several diverse dimensions, with varied and confusing replies ensuing. Probably the most prominent of these mythical representations of African law are anthropological reports and research contained in the works of Driberg (1934), Hartland (1924), and Paget (1951). For instance, while reflecting on the African system of law, Driberg reasoned that “generally speaking, symbols of legal authority (i.e. police and prisons)...are completely absent, and in the circumstances would be otiose.”<sup>14</sup> In strongly worded prejudice about Africa and African systems of law, R. T. Paget (1951) opined that “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.... it is futile to seek a reason in tribal justice, as it is not rational.”<sup>15</sup>

Another variant of this myth about African law can be seen in the views of Smith. According to Smith, Africans only knew about customs instead of law.<sup>16</sup> In corroboration of this thesis, M’Baye contended that “the rules governing social behaviour in traditional African societies are the very negation of law.”<sup>17</sup> In furtherance of this thesis, M’Baye contended that traditional Africa sees every rule as law, meaning that Africans lack not only an understanding of the dynamics and language of law but also that African law cannot be distinguished from religion or morality.<sup>18</sup>

In a more prejudicial form, Hartland, in particular, contended that there is the problem of substance in the ascription and description of the qualities of African law. For Hartland,

Primitive law is 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.<sup>19</sup>

The prejudicial nature of these assertions cannot be overemphasised. Regardless of the predilections, the mythical character of these assertions is obvious. In short, all these contentions miss the point. "Except for the differences in social environment," argues Dlamini, "law 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."<sup>20</sup> The same point was evinced by Elias. According to Elias,

The two 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<sup>21</sup>

But then, analysis must go beyond this point. The contention that Africans have little or no system of laws before encounter with Europe is gravely prejudicial.

As argued 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.<sup>22</sup> For example, 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 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.

The idea of *Oowe*, i.e. collective or communal help, is on the one hand a social concept, but on the other it is essentially an agricultural engagement. *Oowe* also speaks of the existence of laws among the Yoruba people. These laws are defined into 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

The pertinent question is what is law? Even in Western jurisprudence, the question remains unanswered. On our part, it is our conviction that the prejudicial nature of this train of thought (that Africans do not have a system of law) for African studies and scholarship may appear obvious, but then the freshness of this racial bias is brought to light by the fact that among legal philosophers and in the field of the sociology of law, the nature and definition of law is about the most thorny and troublesome aspect. Indeed

the whole of legal philosophy seems to be clustered around this perennial difficulty. A century<sup>23</sup> of ideological and listless debates and arguments on the very nature of law<sup>24</sup> 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 our ideological predilections and inclinations. Apart from this, the unsettled nature of this dilemma in general jurisprudence reveals the Eurocentric bias against Africa, Africans and African realities. If the nature of law is unsettled even in Western legal theory, it is preposterous to conclude that a part of the world is lacking in the understanding, conception and reflection on that same item of human knowledge. Citing living examples from the Barotse, Max Gluckman argues that Africans had held a theory of law and government similar to that of Albert Venn Dicey. The fact that these thoughts were not written is another inquiry altogether. In his words,

Though the setting of African law might be exotic, its problems were those which are common to all systems of jurisprudence.... Barotse courts are dominated by ideas of justice and equity. These ideas influence their total evaluation of evidence... the Barotse believe that justice in this sense is self-evident to all men, and they call their principles within this justice, laws of God, or laws of human kind. That is the Barotse have a clear idea of natural justice, which they constantly apply. They apply natural justice, of course, within particular economic and social conditions...but it is natural justice. And natural justice involves for them, as for us, certain ultimate principles of law, as that a man who injures another shall make recompense; no man should be a judge in his own suit....<sup>25</sup>

### **Myth 3: African Jurisprudence has No Respect for Individual Rights**

The third myth with respect to African jurisprudence is the view that African philosophy of law and society has no respect for individual rights. In other words, it contends that the

status of the individual is precarious. There have been various dimensions to this mythical relegation of African law. For example, some are of the view that the basis of operation in African law is communalism not individualism. There may be a modicum of truth in this assertion but then it is not the whole truth. Even though a communal bond exists, it does not in the essential sense 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, who notes that 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.”<sup>26</sup>

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 enclave. Within this kind of reciprocal relationship, individual life is not only enhanced but it derives meaning and significance.

However, the argument on the rights of the individual in African philosophy of law has been taken further than this. In Driberg’s version, African law subscribes to and is founded on a collectivist organisation.<sup>27</sup> Rendered in a similar but different sense, M’Baye posits that African law only offers an opportunity “to live under the protection of the community of men and spirits<sup>28</sup> for the individual; there are no individual rights,<sup>29</sup> the individual has no role to play in legal relations;<sup>30</sup> and that it is only in rare circumstances

that the individual is treated as a legal subject in African law. In his conclusion, “only the ‘personage’ is taken into serious consideration.”<sup>31</sup>

It is evident that the proponents of this myth are simply exaggerating 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 applied to him and the significance of this is that what were considered as rights, previously, cease 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 qua the community. As argued by Dlamini, the individual bears 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.”<sup>32</sup>

Furthermore, emphasis on rights in African law only transcends the individual, and does not mitigate or vitiate its status. There is a difference between “erosion of the status of” something and “transcending the status of” something. 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 revered and exaggerated opinions of Fortes concerning the philosophy of society held by the Tlensi of Northern Ghana in West Africa. Fortes had declared most presumptuously that “the solidarity of the whole is

stressed at the expense of their individual private interests or loyalties”<sup>33</sup> among this tribe. At best this opinion is a myth; less euphemistically, an exaggeration. In Yoruba philosophy of law, for instance, social cohesion and communal obligation do not make the status of the individual 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 of demarcation.”

As a matter of fact, one of the complex historical processes behind the success of the African philosophy debate, as emphasised by Oruka and others, neither creates nor indicates an insecure position for the individual in the African philosophy of society, or, by extension, in African jurisprudence. This historical and complex process concerns what is referred to as sage philosophy or sagacity. As propounded by Oruka,<sup>34</sup> sage philosophy is a healthy practice indicating the presence of a critical and rational spirit in African communal or traditional societies. But the most important truth about sage philosophy is that it is individualistic not corporate. This will, in the obvious sense, run against the opinion of John Mbiti that in Africa “a person cannot be individualistic, but only corporate.”<sup>35</sup> This is to overdraw the picture of African traditional life.

The individual in African society “develops the sense of duty and obligation to live and work for the whole”<sup>36</sup> but then it does not in any way vitiate the rights, obligations and responsibility of the individual in the African philosophy of law and society. This is why this adage is of celebrated importance for the status of the individual among the Yoruba people, for instance. Among the Yoruba people, the adage *ko ju ma ri*



*'bi ese loogun re* means that “the foot is the answer if the eye would avoid mischief,” i.e. in situations of danger or crisis, one is expected to take appropriate action.

In the same vein, the Yoruba people also have an adage which states that *a ki wori olori kawodi gbe teni lo*, meaning that “you should not keep keen watch over other people’s matter while the evil bird makes away with your own.” The meaning of these proverbs lends credence to the fact that African law respects and protects individual rights and liberties. From these adages, responsibility in any relevant areas of life whether in morals, law, religion, first have their foundation in individualism before its translation and application into our communal dimension of being. The brand of individualism encouraged and emphasised in the African philosophy of society is one that detracts completely from what C. K. Anyanwu branded as “psychic dissociation”<sup>37</sup> in the society.

Set within the context of the above, the importance of African philosophy of law lies in the fact that it is a pointer and solution to one of the aching controversies in western political philosophy—the individualism and communitarian debate. One of the premises and promises of the future of African jurisprudence stems from the fact that it moderates the sort of individualism that the notion of the Rule of Law is peddling today. The concept of the Rule of Law as enshrined in most constitutions of modern states today advocates individualism. The basis for this is captured in the fact that it alone encapsulates or expresses the dignity of man in a hostile world that does not pay attention to the individual.

For African jurisprudence, while the ideals of individualism are centrally located in the dignity of man, individualism with a human face is what the world needs. What this means is that the individualism which creates room for what Anyanwu calls “psychic

dissociation” should be banished from our legal concepts and principles. Therefore, the relevance lies in its moderation of the understanding of individualism in our modern world. In effect, the beauty of that moderation consists in the fact that the individual should be seen in the light of the whole, and that meaning, significance and value “depend on the art of integration.”<sup>38</sup> The problem of integration in the world today is critically located in the kind of scalpel used in defining integration. Integration as often been seen as consisting only in the actions of dissociated individuals. Necessarily, therefore, the principles inherent here are bound to be flawed.

#### **Myth 4: African Jurisprudence is Positive not Negative**

The fourth myth concerns the claim that African philosophy of law is positive and not negative. The meaning of this assertion consists in the view that at the heart of African law is the pursuit of social equilibrium, the maintenance of pre-existing harmony and not the punishment of offenders. In other words, it is claimed that African law is only concerned with how people should behave in the society, not the penalty for crimes committed. This view was propounded and celebrated by Driberg. According to Driberg, African criminal law only directed how people should behave towards one another, neglecting in the process the punitive aspect of law. The implication for African law, reasons Driberg, consists in the fact that African law is a weak instrument for curtailing crimes and criminal offences in the society. To this end, the capacity for enforcement in African law is lacking or substantially eroded.

The falsity of this charge against African law is obvious. In general, it is a necessary condition that laws in every human community respond to both positive and

negative aspects. In the positive sense, law promotes the guarantee and safeguard of rights, liberties and freedom. It ensures the promotion of a healthy and safe environment for the cultivation of hope and peace with respect to the common good. This constitutes the positive aspect of law. On the other hand, law also performs a negative function which is the punishing of offenders against the societal ethos and rules. This much is what the criminal aspect of law in every society is concerned with. Certain acts are regarded as offences against the state, and punishment for their breach is clearly spelt out by the canons of the law.

Both aspects of the law are found entrenched as the substance of African law. As it has been argued, African law differs from Western law only in terms of emphasis and degree and not in terms of substance. It is a proposition too plain to be contested that what Driberg regarded as the negative part of law is an essential feature incorporated in African law. In fact, the issue of punishment is not taken lightly in African law. The idea of punishment in African jurisprudence transcends the concept of punishment found in Western penology. Whereas western penology sees punishment only in the light of the offender, the idea of punishment for crimes in African philosophy of law and society touches not only on the immediate offender but also on the family and the community where the offender is necessarily a member.

One other striking quality of African jurisprudence in this respect, one which makes it remarkably different from the Western jurisprudence and penology system, consists in the idea of reconciliation. Even where offenders in a crime situation are punished for their crime under the relevant law in Africa, the beauty of the African penology system is the reconciliation of the offender to himself, the victim concerned in

the case and the entire society at large. The reconciliatory aspect of punishment is a significant aspect of African philosophy of society.

The application of sanctions is a very prominent aspect of African law. These consist of sanctions such as expulsion from the community, supernatural sanctions, withdrawal of economic co-operation, seizure of property, ostracism, public ridicule, and even capital punishment. All these are applied, one way or the other, in African philosophy of law. The enforcement of these varying punitive measures in African jurisprudence varies, and is dependent on the context and the circumstances involved.

This concept of punishment or the idea of sanctions altogether can be readily understood among the Yoruba people of West Africa. For the Yoruba people, matters of crime and the attendant punishment are prime elements of jurisprudence. The Yoruba people have a saying that *ika ti o se ni oba nge*, meaning that “the finger that offends is that which the king cuts.” Again, it is said among the Yoruba people that *Nitori ti a baa se ni a fi Il’oruko*, meaning that “we bear names (for purposes of identification) in case we would commit (criminal) offences.”

From these two statements, the concept of punishment, as a valid and salient feature of Yoruba jurisprudence, is easily and readily portrayed. The first proverb expresses Yoruba belief in the fact that it is he who commits a crime who should be punished or sanctioned. Definitely, therefore, Yoruba jurisprudence frowns on the punishment of the innocent in any given dispute or criminal case. It is in the light of the importance of not attributing blame to the innocent that Yoruba elders often resort to very particular, exhaustive and mysterious means to establish the heart of a case, especially when the issue hinges on complicated and complex grounds. It is believed that where an

innocent person is unjustly punished for a crime that was committed by another, the consequences for the society can be deadly and grave. In an important sense, therefore, Yoruba jurisprudence recognises and incorporates the salience of punishment in any criminal matter.

The second proverb among the Yoruba people also portrays the acceptance of punishment in Yoruba jurisprudence. Names are a significant index of identification in general and a mark of personal identity. They are identity indicators, attributing certain qualities to the person concerned. In this case, what is meant is that names are crucial in identifying who is to be punished in any criminal matter. Without names, where crimes are committed, it becomes very difficult to isolate and identify the culprit for the purposes of punishment. The Yoruba concept of names is not only significant in terms of punishment but also important in the overall structure on which their jurisprudence is established.

This easily refutes the mythical conclusion often peddled against African law as lacking the elements of sanctions and punishment. In fact, African philosophy of society in which such jurisprudence is embedded contains a very rigorous and severe system of punishment and sanctions that no member of that society would want to incur. Granted its postulates, the mythical character often granted and ascribed to African law as being positive only and not negative in relation to the absence of punishment is refutable. In what can clearly be judged as a conversion experience with respect to an initial attitude to African law, C. C. Roberts enthused that

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.... That there is a recognised code of law founded

on principles of justice is apparent if one examines the native laws affecting murder, adultery, theft, and many others.... As to the laws governing inheritance, ownership of children, property or mortgage we find much resemblance to those in force in European countries.<sup>39</sup>

To push the argument further in the realm of reality, there are outlined cases of practices which point to the existence of laws in African societies and the idea of punishment that arises from them. Significant in this set of social practices is the Yoruba practice of “opening the calabash.” This practice is not only social, but imbued into the act is a judicial and legalistic function, a pronouncement of the verdict of the community against the excesses of the king. This is one of the several practices in Yoruba land that point our attention to informal legalistic decision-making actions. The juridical importance of the practice of “opening the calabash” can be understood as a fallout from attempts to flout the proper procedure for legal decisions, law making and law breaking in the relevant communities. Whatever positive laws or actions are put forth by the sovereign, i.e. the Oba, the Ogboni cult,<sup>40</sup> as custodians of the divine oracle and laws, ensure that the sovereign does not exceed his authority. The seriousness of the connection between positive laws and moral rules in the Yoruba worldview is often projected and demonstrated by recourse to the practice of what is called “the opening of the white calabash with egg.” Daramola and Jeje described this practice thus:

In the olden days, when a particular community wants to demonstrate the masculinity or masculine prowess of its monarch, the council of elders gathers together to prepare ‘the egg’ in a white calabash for the monarch. Once the monarch succeeds in opening the calabash and actually sees the egg in this white calabash, the end is a ‘glorious’ exit from earth.<sup>41</sup>

The basis for this practice consists in what Daramola and Jeje describe as a conflict between the sovereign's personal pride, as exhibited in his actions, laws and reign, and communal expectation and tradition. In the traditional sense, law and morality are not especially differentiated as a means of social and communal control. This is not only because they (the laws and moral injunctions) reflect and embody the traditions of the people, but also because they have over the years come to represent a vital, moving force or aspect of traditional culture. In this traditional culture, it is unlikely that what is forbidden by the moral life of the community will be found enjoined expressly in their laws. The impossibility of the converse also stands. In this kind of traditional society, laws and morals bear the essential character of taboos and therefore have the same source: the gods of the land. In fact, conformity to established tradition<sup>42</sup> best describes the basis for which the practice of opening the white calabash is performed.

### **Myth 5: The Basis of Obligation in African Jurisprudence is Belief in or Fear of Supernatural Powers**

Bertrand Russell was credited with the saying that fear is the basis of religion.<sup>43</sup> This insalubrious comment on religion in general has become associated with the practice of religion in Africa. This forms the foundation of the next myth with respect to the basis and structure of African law. It is commonly held that the basis of obligation in African law, unlike in the West, is the belief or fear of supernatural beings.

It is generally believed that Africans are incurably religious. To this end, it is equally believed that every sphere of the African possibility is influenced by religion. This is said to hold for the African idea of law. Hence, as contended by Whitfield,

African government and law “are part of a living organism within the supernatural order.”<sup>44</sup> It is in the light of this that M’Baye contended that the basis of obedience or obligation in African legal theory as a whole could be traced to a belief in “the will of the gods and the wishes of the ancestors.”<sup>45</sup>

As a preliminary observation, two ideas need to be distinguished: the difference between fear of supernatural beings and acquiescence to ancestral wishes and dictates. These two ideas are different but are often conflated. Acquiescence to the dictates of ancestral, departed souls is one thing, and the reverence or fear of supernatural beings is another. Fear of supernatural beings amongst Africans holds, but then it is restricted to areas of breach of sacred rules of rituals and religion popularly called taboo. These taboos are clearly distinguishable from the purview of African law. In fact, as argued by Malinowski, there is no atmosphere of the fear of the supernatural in African society, except in cases which involve “the breach of sacred rules of rituals and religion.” According to him, the “breach of tribal customs is prevented by a special machinery, the study of which is the real field of primitive jurisprudence.”

Given this, it is preposterous to conclude that the basis of obligation and obedience in African law is the fear of the supernatural. This is a myth with respect to African law absolutely unfounded in reality and clearly not in conformity with the state of affairs in African law. Among the Barotse, for instance, Max Gluckman argued that the basis of obedience to the law in Barotse land is what he calls the “idea of justice inherent in the principle of the reasonable man.” Barotse courts do not enforce laws because of fear of supernatural beings. The system contains an advanced process and



procedures for the application of laws of rights and obligations in the light of the values of the reasonable man. In the words of Gluckman,

it seems to me that it is in the study of the reasonable man, in every society, that anthropologists and lawyers can meet. In him social principles and prejudices, customs and habits, group interests and individual experiences, are absorbed, to relate fixed rules of law to the changing variety of life. But the law aims at justice, and the idea of a reasonable man implies an upright man.<sup>46</sup>

Significantly, therefore, the idea of justice as reflected in Barotse law is as rational and straightforward as it is in Western law. In fact, as argued by Elias, fear is “too simple as a legal sanction.” According to him, fear only comes into play, in African philosophy of society and communal interaction, on the basis of proximity of relationship. In his words, Africans knew that supernatural forces were only “effective against kinsmen, neighbours and the people one has contact with.” In his conclusion, Elias debunked the myth of fear of supernatural forces in the following words:

This classic re-statement of an outmoded theory of religious origin of laws shows the writer to be oblivious of the elementary fact that the psychological motivation underlying moral conduct, fear of ridicule or of legal penalty is not peculiar to the European, and that African law does not so weakly abdicate its function in favour of an all-pervading supernatural authority.<sup>47</sup>

### **Myth 6: There is No Such Thing as the Unity of African Law**

The sixth myth with respect to the African conception of law centres on its so-called unity. According to this view, there is no such thing as the unity of African law. At best, the objection to this dimension of African law is often paraded in the denial of the existence of a common African legal culture, African legal tradition, etc. For adherents of this myth, Africa is too diverse in terms of language, culture, ethnic groups to have or bear a common single focus. Rather, what scholars should discuss is the existence of

specific cultures, traditions, etc. Interestingly, this idea about the nature and substance of African law has some of its adherents on African soil. In particular, Olufemi Taiwo considers this aspect of African law and jurisprudence as nothing but a myth. Arguing against the central thesis advanced by F. U. Okafor<sup>48</sup> against legal positivism in Africa, Taiwo criticised Okafor for peddling one of the myths of the African worldview. In essence, Taiwo's disenchantment with Okafor's paper consists in the fact that it elicits some of the troublesome aspects of African philosophy today, namely that of reducing the African experience in ethics and particularly law to one single 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."<sup>49</sup>

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 this or African that, or that we should not mistake the common occupation of a geographical continuum for social consensus,<sup>50</sup> it remains possible that Taiwo's problem over, or denial of, what may be labelled African legal philosophy, ethics or religion, may bother on mere assumption, but not facts. Indeed, facts emerging from anthropological researches and studies contradict his assumption. Ironically what Taiwo has succeeded in doing is actually to legitimise and justify our view that African legal tradition is simply non-antagonistic to Western jurisprudential tradition and as such not remarkably different. But nothing can be farther from his intention than this. What, after all, would Taiwo mean by African philosophy, if talk of

African legal tradition, African culture, African identity or African traditional values is self-defeating? Is our muted objection to the existence of African culture, or what have you, not given sociological and anthropological significance when the West 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. Nwukeze's rejoinder to Taiwo. According to Nwukeze, 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 terms such as 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.<sup>51</sup>

### **Myth 7: The Political (Institutional) Basis of African Law (Jurisprudence) is Non-Democratic**

The next myth with respect to African jurisprudential thoughts concerns the misconception in some quarters that the traditional political institutions on which the African conception of law was based were, strictly speaking, authoritarian, despotic and non-democratic. To this end, it is believed, African jurisprudential thoughts were based on an essentially flawed character: a non-democratic foundation. Put in another form, the argument on which this myth about African law is based simply states that governance under the traditional societies in Africa was at best characterised by the despotic will of

the chiefs and rulers. This despotic will, it is claimed, does not represent or reflect the true character of law but is a perversion of law.

At the heart of this argument and myth, I believe, is a central debate in political sociology and emerging thoughts in African studies. It concerns the question whether African traditional systems were and are democratic. It is often argued by some scholars that the reason why democratic experimentations in African countries are not just fledgling but impracticable consists in the fact that traditional African life and government has never been democratic.

This viewpoint about African law and the African past is not only derogatory but also untrue. If there were any societies in the world that had the history of democracy and respect for the rights of the people and the collective, it is in Africa where every point is debated in an atmosphere of consensus and reconciliation. These are the two hallmarks of democracy in the world today. These ideas are and have always been the traditional and historical way of life of African people. According to Holleman, the role which all African legal systems play is basically reconciliatory. Again, as argued by Gluckman, a perceptive understanding of the conception of law among the Barotse shows the nature of government and governance in operation in Barotse land. According to Gluckman, the Barotse people define law as “general ideas about justice, equity and fairness, equality, and truth, which they believe should inform governing and adjudicating and which they call “laws of humankind” or “laws of God.”<sup>52</sup>

In the same vein, the traditional Yoruba system of governance and administration is a replica of any sound democratic system of governance in the world even today. According to Oludare Olajubu, before the advent of the white man, Yoruba society had a

system of government that was complete and organised. The whole idea of government revolved around the person of the Oba, i.e. the king.<sup>53</sup> In fact, the Yoruba people had a clear and systematic way of dealing with despotism among its chief and rulers. One of such ways was the “opening of calabash” by the Ogboni fraternity, mentioned above. The act of opening the calabash speaks volumes about the nature of governance among the Yoruba people. In fact, it tells of the pitch of rejection and the vote of no-confidence passed against the king whose acts are found to contradict the agreed ethos and ethics of public and collective life. Only moments of despotism and highhandedness in governance and administration of the society compels the Ogboni society to resort to such actions. This is one of the institutional checks against the excesses of the ruler or king. Yoruba history is replete with dramatic instances of such institutional checks and balances.<sup>54</sup>

This is what Elias meant when he wrote that African governments had evolved elaborate mechanisms for the control of the evolution of “monarchical absolutism and political tyranny.”<sup>55</sup> Elias further enthused that all these elaborate mechanisms, “as well as the intangible but effective factor of public opinion serve to protect law and custom by controlling the arrogation of royal power.”<sup>56</sup> As further emphasised by Bohannan, some of these elaborate mechanisms for the control of royal powers in Swaziland included the checks by the chiefs, councils and advisers, the Queen’s Mother’s court and generally the devolution of authority to the regional or local chiefs.<sup>57</sup>

In the final analysis, participation of citizens, freedom of thought and public decision-making are major themes in African political history. Even though there were moments of tensions in which attempts were made to erode these salient ideas of public and collective life, nevertheless, the survival of those traditional institutions even in

modern times is evidence of the triumph of the African past. African jurisprudence, no doubt, shared and still shares part of that triumph.

**Myth 8: African Jurisprudence has no Literary or Philosophical Significance for General Jurisprudence**

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. 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.<sup>58</sup>

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.<sup>59</sup>

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.<sup>60</sup>

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.<sup>61</sup>

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....”<sup>62</sup> 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,<sup>63</sup> eminent in action and speculation, contrary to the racial thoughts of Hume, in the areas of logic, jurisprudence and political philosophy.<sup>64</sup> 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.<sup>65</sup>

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. 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.<sup>66</sup>

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 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."<sup>67</sup>

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 ...<sup>68</sup>

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.”<sup>69</sup> Dependence and dominance, in their full import, do not contribute to the making of authentic interpretation of Africa’s participation in history.

### **Factors Responsible for the Mythic Representations of African Jurisprudence**

There are at least two sets of factors that can be generally adduced in any meaningful, scholarly work, as having contributed to the mythical representation 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 any other 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.

Probably the best capture of the heart of these two factors is that proffered by T. O. Elias and A. A. Allot. For both scholars, the myth about African legal theory is of persistent interest due to the factor of ignorance in the first instance and the problem of written records. According to Allot, for instance, prevailing and pervading myths about African jurisprudence stem from the opinion of ignorance by outsiders who lack sympathy and knowledge.<sup>70</sup> 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.<sup>71</sup>

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 by one form of prejudice or bias or the other, whether consciously or unconsciously.<sup>72</sup>

On his part, Elias attributes the ignorance, and hence, the mythical colouring of African legal theory to three factors: the predominance of missionaries in the field of education in Africa; the aping 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.<sup>73</sup> But then, to be ignorant of an entity does not preclude the existence of that thing nor does it deny it vitality or the substance that it has.

More precise, however, is the view that the recourse to ignorance as a factor responsible for the myths of African legal theory does not capture the force of its absence. As a matter of fact, the display of ignorance about African realities projects more than the absence of knowledge about Africans and their world view. Our feeling is that ignorance is not 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 to which Western jurisprudence subscribes.

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.”<sup>74</sup> 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 a jurisprudential or philosophical nature can be ascribed to it?

However, the peculiarity and absurdity of this argument can be located in the terse but profound statement that to be able to theorise, conceptualise and philosophise on problems of life is one thing and to have written down such reflective thinking and postulations is another matter entirely. The absence of the former does not preclude the latter and conversely, the absence of the latter equally does not preclude the presence of the former. Each stands as an atomic and independent truth and fact on its own.

### **Conclusion: The Future of African Philosophy of Law**

The problem of the twentieth century, as William DuBois conceived 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.”<sup>75</sup> Beneath Western historiography is the attempt to depersonalise and dehumanise the identity of the African. One of the methods by which this project has been pursued 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 relation to the philosophical thoughts of David Hume and Hegel concerning Africa and Africans.

Today, the task of constructing African scholarship in ethics, jurisprudence, philosophy and even politics through its 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.

Finally, the question is what is the future of African jurisprudence or philosophy of law? This is important in the sense that one of the myths, apart from those treated above, on African law consists in its future or salience in the present world. One common feature of anthropological reports from the West on the nature of African law is that those who have been found opposing the very tenets of African law often come to discover the untenability or outrageousness of their views, and end up qualifying what they said or simply negating it. It is in this sense we must understand the importance of the future of African jurisprudence.

In a very significant sense, many aspects of African jurisprudence have been subject to modifications and changes in the light of modernism, urbanism and industrialisation. Again, the dynamic growth of the modern nation-state formula has also contributed to the series of changes that African jurisprudence is undergoing. More than this, the fact that nation-states themselves are getting hooked up in the phenomena of globalisation as a result of the fact that there is change of locus of authority and claims away from nation-states to a new centre of authority, the global world order, is a telling argument that the future of African jurisprudence is being engaged in a form of historical and interpretive reconstruction.

However, as demonstrated in the preceding pages, African jurisprudence thrives on the idea of the moral solidarity of the community and the group that one belongs to. In effect, it is a demonstration of the sustained importance of the group which gives the art of law and its borrowed concepts some sociological flavour and considerations. This juxtaposes and contrasts favourably with the idealised notion of law today which sees law and its historiography as a neutral, value-free, objective and quasi-scientific entity, independent of, and unaffected by, social, moral and economic considerations.<sup>76</sup> As defended and defined by David Kairys, law is no neutral instrument in as much as it is “part of a complex social totality in which it constitutes as well as is constituted, shapes as well as is shaped.”<sup>77</sup> The tenets of African jurisprudence exemplify, to a significant degree, the heart of this truth. Transcending the boundaries between myth and reality with respect to African jurisprudence demands not only an intellectual and empirical refutation of historical prejudices but the incorporation of the practical approach (reconciliation, consensus and cooperative advocacy) to judicial administration and management which it endorses in matters of law and justice.

## Notes

<sup>1</sup> Chandra T. Mohanty, “Under Western Eyes: Feminist Scholarship and Colonial Discourses,” in Chandra Mohanty et al., eds: *Third World Women and the Politics of Feminism* (Bloomington: Indiana University Press, 1984/1997), 71.

<sup>2</sup> Hugh Trevor-Roper, *Rise of Christian Europe* (London: Thames and Hudson, 1964), 9.

<sup>3</sup> A. H. Foote, *Africa and the American Flag* (New York, 1854), 207.

<sup>4</sup> See Theophile Obenga, “Egypt: Ancient History of African Philosophy” in Kwasi Wiredu, ed., *A Companion to African Philosophy* (Malden, MA: Blackwell Publishing, 2004), 31.

<sup>5</sup> 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), 40ff.

<sup>6</sup> 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), 184.
- <sup>7</sup> D. A. Masolo, "African Philosophers in the Graeco-Roman Era" in Wiredu, 62.
- <sup>8</sup> G. W. F. Hegel, *The Philosophy of History*, trans. J. Sibree (New York: Dover, 1956), 91.
- <sup>9</sup> *Ibid.*, 99.
- <sup>10</sup> Obenga, 32.
- <sup>11</sup> *Ibid.*, 32-33.
- <sup>12</sup> William Idowu, "Social History, African Identity and the Memory Theory" (*The Anthropologist* 5.4), 244.
- <sup>13</sup> I. M. Lewis, "Tribal Society" in *Encyclopaedia of the Social Sciences* (New York: Macmillan and Free Press, 1968), 150.
- <sup>14</sup> J. H. Driberg, "The African Conception of Law" (*Journal of the African Society* 34, 1934), 237-38.
- <sup>15</sup> R. T. Paget, *The Observer*, July 8, 1951.
- <sup>16</sup> M. G. Smith, *The Sociological Framework of Law*, Chapter 2, Kuper and Kuper, 1965.
- <sup>17</sup> K. M'Baye, "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.
- <sup>18</sup> *Ibid.*, 139-140.
- <sup>19</sup> E. S. Hartland, *Primitive Law*, 1924, 5-6.
- <sup>20</sup> M. A. Dlamini, "African Legal Philosophy: A Southern African View" (*Journal for Juridical Science* 22.2, 1997), 72.
- <sup>21</sup> Teslim Elias, *The Nature of African Customary Law* (Manchester, 1956), 33.
- <sup>22</sup> Adegboyega Sobande, "Eewo" in Oludare Olajubu, ed., *Iwe Asa Ibile Yoruba* (Ikeja: Longman Nigeria), 1978), 23.
- <sup>23</sup> Cf. Robert P. George, "What Is Law? A Century of Arguments" (*First Things, Journal of Religion and Public Life*, 112, 2001), 23-29, [www.FirstThings.com](http://www.FirstThings.com)
- <sup>24</sup> Indeed, arguments on the nature of law in jurisprudence are endless. The positions of the schools of thought in jurisprudence on the nature of law are irreconcilable and conflicting. The respective schools of thought are the Positivist, the Naturalist, the Realist, the Pure Theory of Law, the Historical and Anthropological School 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 few 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 the American statement of realism is different from Scandinavian realism. The list of irreconcilable theses in each of these schools of thought 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.
- <sup>25</sup> Max Gluckman, *Order and Rebellion in Tribal Africa* (London: Cohen and West, 1963), 178, 197.
- <sup>26</sup> Max Gluckman, "Natural Justice in African Law" in C. Varga, ed., *Legal Cultures*, 1992, 176.
- <sup>27</sup> Driberg, 231.
- <sup>28</sup> M'Baye, 138.
- <sup>29</sup> *Ibid.*, 139.
- <sup>30</sup> *Ibid.*, 143.
- <sup>31</sup> *Ibid.*, 144.
- <sup>32</sup> Dlamini, 80.
- <sup>33</sup> Quoted in Basil Davidson's *The African Genius*, 71.
- <sup>34</sup> Henry Odera Oruka, "Sagacity in African Philosophy," in Tsenay Serequeberhan, ed., *African Philosophy: The Essential Readings* (New York: Paragon House, 1991).
- <sup>35</sup> John Mbiti, *African Religions and Philosophy*, 209.
- <sup>36</sup> E. A. Ruch and C. K. Anyanwu, *African Philosophy* (Rome, 1984), 375.
- <sup>37</sup> C. K. Anyanwu, "African Political Doctrine" in Ruch and Anyanwu, 375.
- <sup>38</sup> *Ibid.*, 371.
- <sup>39</sup> C. C. Roberts, *Tangled Justice*, quoted in Elias, *The Nature of African Customary Law*, 63.



<sup>40</sup> Essentially, the *Ogboni* institution is a secret group. No one, except members, can really know the depth of its practices. But then, its influence in Yoruba societal life is not a secret. In fact, the *Ogbonis* are more or less, the law makers in the respective Yoruba community they have found themselves. This is because, in traditional Yoruba society, the *Ogboni* is the body of all the elders in the community. According to Daramola and Jeje, in the traditional Yoruba community, there is no observed difference between the members of *Ogboni* and the council of elders. In the more factually relevant sense, it is the members of *Ogboni* that becomes members of the council of chiefs or elders in the land.<sup>40</sup> (Olu Daramola and A. Jeje *Asa ati Awon Orisa Ile Yoruba*, Ibadan: Onibonoje Press, 1970, 160.) From this it is decipherable that they wield utmost constitutional powers both in the religious sense and then in the judicial/political senses. To this end, they can be described as a group with integrated social, political and legal influences. The over-all dominance and prominence of the *Ogboni* institution seem to have been derived from two closely interconnected sources: in the first instance, they control the political life of their community and secondly, they possess the power of the sanctions of the gods. The fusion of both sources of power has elevated them to the status of the most dreaded institution in Yorubaland. This is captured in the observation of Robert Smith that the *Ogboni* group is devoted to the worship of the earth, which wielded both religious and political sanctions. They alone, according to Smith, control the “Byzantine Quality” characteristic of traditional Yoruba system of government, which effectively means, in the language of Smith, the “fusion of political, judicial, and religious concepts and the division of responsibilities.”<sup>40</sup> (Robert Smith, quoted in Roland Hallgren, *The Good Things of Life*, Loberod: Plus Ultra, 1988, 64.)

<sup>41</sup> Daramola and Jeje, 160. The present writer’s translation from Yoruba to English.

<sup>42</sup> Tradition, as used here, describes the rules and regulations of that society. These regulations, though largely unwritten, are not mere human pronouncements as the living dead (ancestors) are the ultimate executors of the regulations. See Anthony Echekwube, “Traditional Social Institutions and Human Rights Promotion in Nigeria” (*Enwisdomization Journal* 2.1, 2002-2003), 29.

<sup>43</sup> Bertrand Russell, *Why I am not a Christian* (New York: George Allen and Unwin, 1957), 22.

<sup>44</sup> G. M. B. Whitfield, *South African Native Law*, 1948.

<sup>45</sup> M’Baye, 148.

<sup>46</sup> Max Gluckman, *Order and Rebellion in Tribal Africa*, 192.

<sup>47</sup> Elias, 61.

<sup>48</sup> F. U. Okafor, “Legal Positivism and the African Legal Tradition” (*International Philosophical Quarterly* 24.2, Issue 94, 1984), 157-164.

<sup>49</sup> Olufemi Taiwo, “Legal Positivism and the African Legal Tradition: A Reply” (*International Philosophical Quarterly* 25.2, Issue 98, 1985), 198.

<sup>50</sup> *Ibid.*, 198.

<sup>51</sup> P. C. Nwakeze, “A Critique of Olufemi Taiwo’s Criticism of Legal Positivism and African Legal Tradition” (*International Philosophical Quarterly* 27.1, Issue 105, 1987), 101.

<sup>52</sup> Max Gluckman, *The Ideas in Barotse Jurisprudence* (New Haven: Yale University Press, 1965), 20.

<sup>53</sup> Oludare Olajubu, “Ijoba Ibile laye Atijo” in Oludare Olajubu, ed., *Iwe Asa Ibile Yoruba* (Ikeja: Longman Nigeria, 1978), 89.

<sup>54</sup> According to Bolanle Awe, in the eighteenth century this kingdom was the scene of a series of conflicts 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 Alice Schlegel, ed., *Sexual Stratification: A Cross Cultural View* (Columbia: Columbia University Press, 1977), 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, *Asa ati Awon Orisa Ile Yoruba* (Ibadan: Onibonoje Press, 1970), 160

<sup>55</sup> Elias, 18.

<sup>56</sup> *Ibid.*

<sup>57</sup> P. Bohannan, *Africa and Africans* (1964), 191.

<sup>58</sup> David Hume, *Philosophical Works*, vol. 111, 228-229.

<sup>59</sup> David Hume, *An Inquiry Concerning Human Understanding* (Buffalo: Prometheus Books, 1988), 77-78.

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- <sup>60</sup> Eric Morton, Eric, “Race and Racism in the Works of David Hume” (*Journal on African Philosophy* 1, 2002) 1.
- <sup>61</sup> Claude Sumner, “The Light and the Shadow: Zera Yacob and Walda Heywat, Two Ethiopian Philosophers of the Seventeenth Century” in Wiredu, 172.
- <sup>62</sup> Kwame Anthony Appiah, *In My Father’s House: Africa in the Philosophy of Culture* (London: Methuen, 1992), 144.
- <sup>63</sup> 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, 66.
- <sup>64</sup> Souleymane Bachir Diagne, “Precolonial African Philosophy in Arabic” in Wiredu, 68
- <sup>65</sup> Souleymane Bachir Diagne, 68-69.
- <sup>66</sup> 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> )
- <sup>67</sup> Ibid.
- <sup>68</sup> Hegel, 98.
- <sup>69</sup> Morton, 1.
- <sup>70</sup> A. A. Allot, *Essays in African Law* (London: Butterworth, 1960), 55.
- <sup>71</sup> Ibid.
- <sup>72</sup> Ibid.
- <sup>73</sup> T. O. Elias, *Government and Politics in Africa* (Manchester: Manchester University Press, 1963).
- <sup>74</sup> Ibid., 21.
- <sup>75</sup> W. E. B. DuBois, “The Conservation of Races” in Albert Mosley, ed., *African Philosophy: Selected Readings* (Englewood Cliffs, NJ: Prentice Hall, 1995).
- <sup>76</sup> This is one of the features, and perhaps flaws, of legal positivism as formulated by H. L. A. Hart. According to Hart, Legal Positivism can be defined as 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 origins 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.” Furthermore, Hart contended that positivism in jurisprudence is 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.” See H. L. A. Hart, “Positivism and the Separation of Law and Morals” (*Harvard Law Review* 71.4, 1958), 601-602. This conception of positivism, apart from being one of the most contentious philosophical positions, has kept the whole of jurisprudence on an intellectual vigil. Obviously, the central theses of African law (jurisprudence) reflect an unmitigated rejection of this standpoint.
- <sup>77</sup> David Kairys, ed., *The Politics Of Law* (New York, 1982), 4.