

# RETHINKING LEGAL-CONSTITUTIONAL DEVELOPMENT IN AFRICA: BEYOND THE LIMITS OF LEGAL POSITIVISM, TOWARDS A CULTURAL JURISPRUDENCE

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## ABSTRACT

One of the areas of intensive engagement with respect to African development is the adoption of a sound theoretical blueprint or legal framework for constitutional advancement and development in Africa. This drive has always been premised on the fact that a sound legal theory or framework is of utmost necessity and importance in the political economy of African development. In this light, one legal theory which has become intestinal to African legal history and evolution, courtesy of colonialism, is the theory of legal positivism. The theory of positivism has not only been suggested as the best legal theory for constitutional development in Africa but equally hailed as the most popular and theoretically thoroughgoing (See Jare Oladosu, "Choosing a Legal Theory on Cultural Grounds: An African Case for Legal Positivism," in *West Africa Review* (WAR) an On-line Journal, 2002).

In its material particular i.e. regardless of the arguments often advanced in favour of, legal positivism, as a legal theory, has been the object of pertinent criticisms in its application to the African legal and constitutional charter (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; F. U. Okafor, "Legal Positivism and the African Legal Tradition" in *International Philosophical Quarterly*, Vol. xxiv, No. 2, Issue No 94, June 1984).

This paper seeks to raise critical issues with respect to on-going debates on the need for a rethinking on African development by examining the thesis of legal positivism in relation to the African legal landscape and conundrum. It also seeks to examine the basis for the suggestion for the adoption of legal positivism as a legal theory for constitutional development in Africa.

The paper discovers that of fundamental importance to the adoption of legal constitutional frames for ensuring African development is the need to adapt to local conditions and transcend the so-called recipe for progress inherent in Eurocentric projections. Legal-constitutional frames for African developmental agenda have been necessarily measured by western jurisprudence such that the definition of development we get from that intellectual list cannot be representative but necessarily ingrained in an Eurocentric historiography which defines and determines the past or present in the light of its own history.

The conclusion of the paper is the claim that there is the need for constructing, in the light of the agenda for the rethinking of African development, how to transcend the limit of legal positivism towards the reworking and construction of alternatives legal theoretical constructs for African legal and constitutional development. In this direction, it seeks to raise the following questions for intellectual laceration: what is the cultural basis for the limit of legal positivism in Africa? How and when is cultural jurisprudence needed to enter into the charter of development for Africa? What is cultural jurisprudence? What are the conceptual possibilities inherent in cultural jurisprudence? How does cultural jurisprudence proffer an alternative scheme of development for Africa?

# **RETHINKING LEGAL-CONSTITUTIONAL DEVELOPMENT IN AFRICA: BEYOND THE LIMITS OF LEGAL POSITIVISM, TOWARDS A CULTURAL JURISPRUDENCE**

## Introduction

One of the areas of intensive engagement with respect to African development is the adoption of a sound theoretical blueprint or legal framework for constitutional advancement and development in Africa. This drive has always been premised on the fact that a sound legal theory or framework is of utmost necessity and importance in the political economy of African development. This area of intellectual study concerned with the provision of sound legal and constitutional framework is called jurisprudence.

As an intellectual discipline, jurisprudence has attracted the least of intense cerebral attention in contemporary studies on Africa. In very compelling terms, the subject of the state in Africa is incomplete without a critical laceration 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 jurisprudence, particularly that of the African state and her jurisprudence, 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. In less apologetic terms, jurisprudence is not only misconceived but also misrepresented.

There are many dimensions to the misrepresentation of the nature of jurisprudence. The misrepresentation stems, in one instance, from the fact that scholars often think of jurisprudence as a mere accumulation of ancient wisdom that has no relevance for our modern world. In another instance, many critics of the subject of jurisprudence create their own difficulties about the subject by forcing certain conclusions on the nature of the discipline.

One of such conclusions is that jurisprudence is merely and entirely speculative and thus not of timely and contemporary interest and importance. Often times, the assumption beneath their conclusion about the nature of jurisprudence is contained in the view that there is a demand for specificity and scientificity, qualities which are lacking in jurisprudence arising from its speculative nature, in the modern world ravaged by lingering uncertainties and prolonged hopelessness. But nothing can be farther from the truth than this.

As a matter of fact, 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. This makes the study of law the central concern of jurisprudence. In fact, as argued by Freeman, jurisprudence is more of a contemporary enterprise than a mere accumulation of ancient wisdom. According to Freeman (1996:16), 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.

This paper is concerned with raising a critical interrogation on the question of legal-constitutional development in Africa. To this end, the paper seeks to discuss the

idea of legal and constitutional development in the light of the theory of legal positivism. What the paper considers is the view that legal positivism, though a particularly interesting and important legal theory in consideration of constitutional development, its significance and importance for constitutional development in Africa is dampened by the fact that it considers all appeals, recourse and considerations of cultural, moral, metaphysical and prudential reasons in the understanding of law and the process of constitutional restructuring and development as completely outside the frame of legal cum constitutional development and advancement.

In the light of this, the paper suggests that the direction of constitutional and legal development in African legal systems should take after the cultivation and promotion of a cultural jurisprudence. A cultural jurisprudence, it is believed, will engender a more significant constitutional growth in the light of local conditions and situations. To execute this purpose, in the first instance, the paper shall attempt to understand the jurisprudence of development, after which the paper makes an attempt to understand the nature of legal positivism. The debate on legal positivism in relation to the African conundrum shall be established and, finally, the paper shall attempt to construct the nature of a cultural jurisprudence and its relevance to the process of constitutional development in Africa.

## **THE DILEMMA OF CONSTITUTIONALISM IN AFRICA**

African social science discourse is bedevilled by the absence and dearth of authoritative discussions and rigorous analysis on the relation between jurisprudence, conceived as the body of philosophical thoughts on the role of law in the social sphere and the exercise of power. This absence is sometimes explained in the light of the fact that the place of law is often interpreted to be limited to the law courts only. Thus, critical discussions on the role of the law in relation to governance, development and the state have all been considered as out of place. Yet, as contended by Okoth-Ogendo, there is no theory of power in African discourse which can be complete without a lively discussion of the idea of constitutions and constitutional law. This is because, according to him, “all law, and constitutional law in particular, is concerned, not with abstract norms, but with the creation, distribution, exercise, legitimational effects and reproduction of power.”<sup>1</sup>

According to Okendo, the paradox between constitutions and constitutionalism in Africa consists in the fact that African ruling elites are attracted relentlessly to the idea of constitutions since, in the first instance, that is what ensures and guarantees the sovereignty of the state and secondly what contains the laws for the governance of the particular society in question. However, what has been concretely missing in the agenda of African ruling elites is the classical and noble idea of constitutionalism, which is the fidelity of governing regimes to the principle that the exercise of state power must seek to advance the ends of society.

The generating paradox between constitutions and constitutionalism in Africa is not only a paradox but equally a dilemma for the much needed process of constitutional development. It is believed that the enhancement of the ideals of constitutionalism will, no doubt, enhance the level of development in Africa states. As a matter of fact,

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<sup>1</sup> Okoth-Ogendo, H. W. O. “Constitutions without Constitutionalism: Reflections on an African Political Paradox” in *State and Constitutionalism An African Debate on Democracy*, edited by Issa Shivji, Harare: SAPES Trust, 1991, pp. 3-25, at p. 5.

constitutionalism, being the end product of social, economic, cultural and political progress, remains a forlorn hope in Africa's march towards developmental democratisation. There are many factors responsible for this historical malaise in Africa.

One of the critical factors which scholars have painstakingly reflected upon consists in the nature of legal philosophical theory which has been elevated to the point of ideological interests in the foundation of most constitutions in Africa. This drive has always been premised on the fact that a sound legal theory or framework is of utmost necessity and importance in the political economy of African development. In this light, one legal theory which has become intestinal to African legal history and evolution, courtesy of colonialism, is the theory of legal positivism. The theory of positivism has not only been suggested as the best legal theory for constitutional development in Africa but equally hailed as the most popular and theoretically thoroughgoing. In this paper, I shall make an attempt to discuss the theory of positivism and how it explains in part the dilemma of constitutionalism in Africa. But then what is legal positivism?

### **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 Waluchow, "controversy and confusion abound concerning just what it is that legal positivists are supposed to be saying."<sup>2</sup> 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."<sup>3</sup>

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.

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<sup>2</sup> Waluchow, W. "The Many Faces of Positivism" *University of Toronto Law Journal*, XLVIII, No. 3, 1998, p. 2.

<sup>3</sup> 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.

The task of constructing the science of social phenomena is not original to it. 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).”<sup>4</sup>

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 which are purely outside the reach of science. But then analysis must go further than this. This is the first source of the emergence of positivism in jurisprudence and matters of law.

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. 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 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

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<sup>4</sup> 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/>>.

divine law or natural law is juridically valid, according to legal positivism, unless so recognized and duly formalised by the state or its government.<sup>5</sup>

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. 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.<sup>6</sup> 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;
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.

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<sup>7</sup>.

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'<sup>8</sup>.

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<sup>5</sup> Arnold Brecht *Political Theory The Foundations of Twentieth Century Political Thought*, Delhi: Princeton University Press and Surjeet Publications, 1989, p. 183.

<sup>6</sup> 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.

<sup>7</sup> Dias, R.W.M. *Jurisprudence*, London: Butterworths and Co., Publishers, Ltd., 1985, p. 470.

<sup>8</sup>See Olufemi Taiwo, *Legal Naturalism - A Marxist Theory of Law* (New York: Cornell University Press, 1996) pp. 37 - 38.

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.”<sup>9</sup> 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
- (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.<sup>10</sup>

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.<sup>11</sup>

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

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<sup>9</sup> Hart H.L.A., “Positivism and the Separation of Law and Morals”, *Harvard Law Review*, vol. 71 (1957-58), p. 595.

<sup>10</sup> Hart H.L.A., “Positivism and the Separation of Law and Morals”, *Harvard Law Review*, vol. 71 (1957-58), pp. 601-602.

<sup>11</sup> Bobbio, N. *Legal Positivism (Il Postivismo Giuridico)*, Turin: Giapichelli, 1961.

of the English language) to western readers, remains by far the clearest text written on the controversy between legal positivism and legal naturalism.<sup>12</sup>

## **LEGAL POSITIVISM AND CONSTITUTIONAL DEVELOPMENT IN AFRICA: THE DEBATE**

The debate on legal positivism and its relation to legal and constitutional development in Africa appears to be diverse. In one sense, the debate centres on whether legal positivism is in tune with the nature of African jurisprudence. In another instance, the nature of the debate seems to be centred on the unsuitability of legal positivism to African legal systems in as much as it endorses what scholars have called the doctrine of conformism or the *reductio ad Hitlerum* doctrine.<sup>13</sup> Lately, attempts are beginning to emerge on the suitability of legal positivism in handling the problems of multiculturalism and ethno-cultural in African legal and constitutional systems. This diversity constitutes the heart of the debate on the nature of legal positivism in Africa's constitutional and legal development. But then this debate has its own storied history.

This history has to do with the debate on whether legal positivism is really suitable for Africa. In other words, the debate centres on whether legal positivism is sympathetic in its legal and constitutional therapy to local conditions in Africa. In a nutshell, it is a consideration of the Africaness or un-Africaness of legal positivism. The question then is: is legal positivism a suitable doctrine or system of law for Africa? This is the heart of the debate between Okafor, Taiwo, and Oladosu. The respective views of these authors on the nature of legal positivism and its suitability or otherwise for constitutional development in Africa and the conclusions reached is what we attempt to construct.

Fidel Okafor represents one of the African jurists with great intellectual passion for a cerebrally nationalistic understanding of African legal development. One significant contribution of Okafor's work, therefore, is the demonstration of the unsuitability of legal positivism in the consideration of legal and constitutional development in Africa. The basis of this rejection consists in the fact that an endorsement of legal positivism is an invitation to the rejection of traditional African legal experience and values.

According to Okafor, "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."<sup>14</sup> Writing from the perspective of the Igbo ethnic group in south east Nigeria, the demonstration of the unsuitability of legal positivism for African legal and constitutional development, according to Okafor, is multifaceted.

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<sup>12</sup> Jori, M. "Legal Positivism" in *Routledge Encyclopedia of Philosophy*, Edward Craig (ed.), New York: Routledge, 1998, p. 521.

<sup>13</sup> See Jori, M. "Legal Positivism" in *Routledge Encyclopaedia of Philosophy*, Edward Craig (ed.), New York: Routledge, 1998, p. 515.

<sup>14</sup> 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.

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.<sup>15</sup>*

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

*Enforceability is an essential element in the positivists' definition of law...This means that laws must be backed by a coercive force. The contrary is the case in the Igbo traditional setting. The Igbo positive laws, because of their religious and moral import bind the individuals in conscience – 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.<sup>16</sup>*

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."<sup>17</sup> 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 an ontological the ontology of the Igbo people, according to Okafor, in superlative terms is incongruent with positivists' empiricism. Okafor's work is replete with many instances of vociferous vituperations against the agenda of separating a people from their ontology in terms of law that will regulate their lives.

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<sup>15</sup> Okafor, F. U. *Igbo Philosophy of Law*, Enugu: Fourth Dimension, 1992, pp. 90-91.

<sup>16</sup> Okafor, F. U. *Igbo Philosophy of Law*, Enugu: Fourth Dimension, 1992, pp. 91-92

<sup>17</sup> Okafor, F. U. *Igbo Philosophy of Law*, Enugu: Fourth Dimension, 1992, p. 90.

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.”<sup>18</sup>

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 it the criterion of legal validity. It is thus clear that legal positivism separates ethics from jurisprudence, divorces morality from positive law and makes the will of the legislative organ the only Source of law, as it severe the legal “is’ from the legal “ought”.*<sup>19</sup>

According to Okafor, only a law with an ontological foundation would be a law of the people for the people.<sup>20</sup> 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.*<sup>21</sup>

From the above, Okafor’s conclusion is that legal positivism is a completely un-African legal ideology or doctrine. As such, it is unsuitable for Africa’s legal and constitutional development.

On his part, Olufemi Taiwo considers legal positivism as a bad legal theory, doctrine and constitutional charter to adopt and advocate in Africa. Thus, according to Taiwo the unsuitability of legal positivism for Africa is not in terms of its negation of African legal values nor in its rejection of the ontological worldview prevalent in Africa. 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.<sup>22</sup> In a nutshell, the demerit of legal positivism in the light of constitutional and legal development in Africa consists in the

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<sup>18</sup> Ibid., p. 91.

<sup>19</sup> Ibid., p. 90.

<sup>20</sup> F. U. Okafor, “Legal Positivism and the African Legal Tradition” in *International Philosophical Quarterly*, No. 2, Issue No. 94, June 1984, p. 163.

<sup>21</sup> F. U. Okafor, “Legal Positivism and the African Legal Tradition” in *International Philosophical Quarterly*, No. 2, Issue No. 94, June 1984, p. 163.

<sup>22</sup> Ibid., p. 199.

fact that it endorses a regime of judicial irresponsibility and irresponsiveness. In another sense, it can be said that legal positivism, according to Taiwo, provides a platform for judicial omnipotence. In his words,

A recent dimension to the Okafor and Taiwo debate on legal positivism in Africa is clearly portrayed in the thought-provoking article by Jare Oladosu.<sup>23</sup> While Okafor and Taiwo both, in their different ways, sought to demonstrate the unsuitability of legal positivism for Africa, 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 and constitutional development. 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*<sup>24</sup>.

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 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.

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<sup>23</sup> 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>]

<sup>24</sup> 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>]

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 consist 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.

### **THE LIMITATION OF LEGAL POSITIVISM**

The beauty of the Okafor, Taiwo and Oladosu debate on the suitability or otherwise of legal positivism to the debate on constitutional development in Africa is, no doubt, commendable. However, what is actually missing in those discussions is the failure to point out the weakness of those debate and discussions in relation to the on-going and much expected process of democratisation and development in Africa. In rethinking the concept or process of constitutional development in Africa, and in adopting any legal theory or concepts as a blueprint for constitutional development, it is the contention of this paper that, what a legal theory should emphasise is how democratic development can be engendered. In our submission, it is contended that legal positivism is unsuitable for adoption in engendering constitutional development in Africa in as much as it fails to enshrine and is unsympathetic to the principles of democratic governance.

Development and democracy have been argued to be central concepts in the evolution of a culture of progress in any given society. This applies to every area of societal life – the economic, social, constitutional, political and ideological. According to Adejumbi Said, for the majority of the people, democracy is meaningful only when it delivers socio-economic goods. In other words, political democracy must be linked to socio-economic development.<sup>25</sup> It is how a theory is connected with the internal aspects of democracy and the principles on which it is based that gives the theory a true standing with respect to the process of constitutional development. The question then is in what sense is legal positivism antidemocratic and what is the implication of that for constitutional development in Africa? What is democracy and why is it important in the African milieu? We shall take the last question first.

### **THE DEMOCRATIC PRELUDE IN AFRICA**

Among all forms of government, democracy, on one hand seems to be anchored on a minimum of coercion and yet on the other hand, it enjoys a maximum content of consent, not of the ruler now, but of the ruled, the mob, the plebeians. From this perspective, it appears very strong a view that democracy, even though admired greatly in

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<sup>25</sup> Said Adejumbi "Between Democracy And Development In Africa: What Are The Missing Links?", Being a Paper Presented to the World Bank Conference on "Development Thinking in the Next Millennium", Paris 26-28 June 2000.

the world as the best form of government, it is equally recognised as the most challenging to sustain. But viewed less exuberantly and more parochially, its keynote, argues John Dunn, is above all its determined ordinariness, its will and its capacity to domesticate the life of a human community, and to do so all the way through.

As an old but vigorous idea it sponsors the belief that in human political communities it ought to be ordinary people (the adult citizens) and not extra-ordinary people who rule.<sup>26</sup> The power and appeal of the democratic idea come from its promise to render the life of a community something willed and chosen - to turn the social and the political existence that human beings share into a framework of consciously intended common action. In a democracy, the people, its human members, decide what is to be done, and in so doing they take their destiny firmly into their own hands. The power and appeal of democracy comes from the idea of autonomy - of choosing freely for oneself.<sup>27</sup>

Interestingly, 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."<sup>28</sup>

But the question is why is democracy the overwhelmingly dominant, and the increasingly well nigh exclusive claimant to set the standard for legitimate political authority in the world particularly in Africa? Robert Fatton has provided a weighty intellectual argument in response to the question. 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."<sup>29</sup> Benjamin Nwabueze has argued that the existence and sustenance of constitutional democracy and democratisation involves a

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<sup>26</sup> John Dunn, *Democracy: The Unfinished Journey*, Oxford: Oxford University Press, 1992, p. 1

<sup>27</sup> *Ibid.*, p. 1.

<sup>28</sup> Larry Diamond, "Three Paradoxes of Democracy" in *Journal of Democracy*, Summer 1990, Vol. 1, No. 3, p. 48.

<sup>29</sup> Robert fatton, Jr. "Liberal Democracy in Africa" in *Political Science Quarterly*, Vol. 105, No. 3, p. 455-56.

process of experimentation over time, of trial and error.<sup>30</sup> Richard Cornwell constate that “the driving force behind Africa’s second experiment with democracy came both from ideological conviction and the growing impatience of an ever-bolder public consciousness, and from the related matter of the continent’s prevailing economic woes.”<sup>31</sup> Schumpeter predicates the survival of the democratic doctrine on the continent of Africa on the following reasons: one, historical association of democracy with religious beliefs; two, the association of the forms and phrases of classical democracy with certain events in a people’s history; three, the fact that in some small and primitive societies the democratic doctrine actually fits the facts; and four, that politicians appreciate democratic phraseology even while “crushing opponents in the name of the people.”<sup>32</sup>

From the very beginning, the democratic idea appears particularly simple and straightforward in its definition, composition and nature. Etymologically, the term democracy is derived from *demokratia*. This is a combination of two terms “demo, meaning people or mob and kratos, the Greek word for power or rule. In full, democracy means government or rule by the people for the people. In simple words, the essence of the democratic spirit is the emphasis on the role and place of the commoners. That is, the popular will constitute the sacred essence of what is essentially democratic.

Historically, the democratic idea draws its inspiration as a model for modern government and governance from the Athenian ideal. This is why the Athenian calls their constitution a democracy. In Athens, every individual adult or citizens gives practical \_expression to and exercises the sovereignty of the popular will by active participation in the Athenian Assembly in which national affairs were exclusively debated and experiences and compromises are given due recognition. The Athenian example tended to show the direct and primary nature of democracy.

This golden age of Athenian democracy was expensively exemplified and curiously epitomised by the great Pericles. It is to the works of Pericles that Athenians often refer in any intellectual discussion of the democratic idea. In this sense, it is no misnomer to contend that Pericles provided the apt philosophical capstone and conceptual framework for what is termed instilling the “spirit of democracy”. According to Pericles:

*The constitution by which we live does not emulate the enactment of our neighbours. It is an example to others rather than an imitation to them. It is called democracy because power does not rest with the few, but with the many, and in law, as it touches individuals, all are equal, while in regard*

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<sup>30</sup> Nwabueze Benjamin, *Democratisation*, Ibadan: Spectrum Law Publishing, 1994, p. 4

<sup>31</sup> Richard Cornwell, "Democratisation and Security in Africa" In: *African Security Review* vol.6, No.1 p. 15.

<sup>32</sup> Schumpeter, J. *Capitalism, Socialism and Democracy*. New York: Harper and Brothers, 1942, 265-268.

*to the public estimation in which each man is held in any field, his advancement depends not on mere rotation, but rather on his true worth; nor does poverty dim his reputation or prevent him from assisting the state, if he has the capacity. Liberty marks both our public politics and the feelings which touch our daily life together. We do not resent a neighbour's pursuit of pleasure, nor cast on him the burden of ill will, which does no injury but gives pains to witness. Our private converse is untroubled, our life in the state free from illegality, owing mainly to respect for the authority of the magistrates of the day, and of the laws, especially laws laid down to help the wronged, and those unwritten laws whose neglect brings acknowledged discredit.*<sup>33</sup>

In essence, Pericles' philosophical formulation and conceptual framework on the democratic idea draws a lot on the idea of citizenship. In other words, democracy can hardly survive without a true sense of citizenship, patriotism, courage and love for one's fatherland. It is this pattern for democratic survival that is given practical expression in Nwabueze's idea of constitutional democracy when he posits that:

*Constitutional democracy or constitutionalism is about the use of the constitution as a supreme and fundamental law to regulate and limit the power of government, legislative, executive and judicial, and has to secure the efficacy of such limitations in actual practice by ensuring the government is not assumed except with the mandate of the people freely given at periodic intervals of time, that it is executed and administered according to the constitution and the laws, that dispute about the constitutional propriety of legislation and other government acts, are adjudicated impartially according to the constitution and laws independent of the disputants, and that ordinary laws applied in the execution of government and the adjudication of dispute are made in conformity with the procedure for law-making prescribed therein.*<sup>34</sup>

Of interests to students of political science and sociology is the definition of democracy by Robert Dahl. According to Dahl, a key characteristic of a democracy is the continuing responsiveness of the government to the preferences of its citizens, considered

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<sup>33</sup> Thucydids: "Pericles' Funeral Speech" in Radice Betty (ed.) *Greek Political Oratory*, Hammondsworths, Penguin Books Ltd., 1970, p. 34.

<sup>34</sup> Nwabueze, B. "Our March to Constitutional Democracy" in *The Guardian*, Lagos, July 28, 1989, p. 15.

as political equals.<sup>35</sup> Dahl's notion of polyarchy has three principal elements: competition for government power, political participation in the selection of leaders and policies and civil and political liberties. For Sorenson, the actualisation of these elements is the attainment of what he calls "real democracy."<sup>36</sup> In like manner, Catherine Newbury tags it "formal democracy" with emphasis on institutionalised mechanisms, means and procedure for changing government personnel; respect for the rule of law, accountable governance and protection of human and civil rights.<sup>37</sup>

For Diamond et. al., democracy is a system of government that meets three conditions; meaningful and extensive competition for selection and removal of personnel excluding the use of force; a highly inclusive level of political participation for selection of leaders and policies; and a level of civil and political liberties sufficient to guarantee the integrity of political competition and participation.<sup>38</sup> Schumpeter concedes the democratic method to consist in that "institutional arrangement for arriving at political decisions in which individuals acquire the power to decide by means of a competitive struggle for people's vote."<sup>39</sup>

## **THE LIMITATION OF LEGAL POSITIVISM AND THE DEMOCRACY QUESTION IN AFRICA**

A positivistic theory of law or constitutionalism is conventionally, no doubt, a coercive theory since it conceives the source of obedience and obligation to law to consist not in the nature of the law or the contents of the law or constitutional order but in the authoritative coercive power by which the laws are made and enforced. From this point of view, law and the constitutional order are conceived as a closed system or order. This is one of the heritages of legal positivism. It celebrates the authoritative coercive power by which laws are made, in the process de-emphasizing the possible limits which could be imposed on the law based on cultural, prudential, moral and democratic reasons.

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<sup>35</sup> Robert Dahl, Dahl, R. *Polyarchy: Participation and Opposition*, New Haven & London: Yale University Press, 1971, p. 1.

<sup>36</sup> Sorensen, G. 1991. *Democracy and the Developmental State*. Aarhus. Denmark: Institute of Political Science, 1991, p. 280

<sup>37</sup> Catherine Newbury, "Introduction: Paradoxes of Democratization in Africa" in *African Studies Review*, Vol. 37, No. 1, p. 1-3

<sup>38</sup> Diamond, et al. *Democracy in Developing Countries*, Vol.2: Africa. Boulder: Lynne Rienner, 1988, p. xvi.

<sup>39</sup> Schumpeter, J. 1942. *Capitalism, Socialism and Democracy*. New York: Harper and Brothers, 1942, p. 269.

Again, any positivistic theory of law or constitutional theory once conceived as a coercive theory of law suggests to us that such a theory or constitutional order deals with means rather than ends. As already established, it means such a theory is concerned about commands since coercion is related or connected to or a product of command. It follows that command theory of law, that is, a positivistic theory of law, is antithetical to justifications of rules at any point in the governance of society. In other words, coercive or positivistic theory of law deals with the will of the ruler or rulers rather than reason seeing as unnecessary any invitation for a logical justification of power. In a nutshell, any theory that is positivistic is only interested in what 'is' and not what ought to be in which case such a constitutional or legal theory will advocate for the rigid and severe separation of law from other normative categories of human societal existence such as morals, culture, sentiments of language, religion and even prudential reasons.

And what is more, a positivistic theory of law is unsympathetic and politically neutral to democratic values since it elevates the power of coercion in any political system beyond the limit of reason. This is why when Olufemi Taiwo rejected legal positivism in relation to constitutional development in Africa based on the fact that it creates room for manipulation by self-serving judges to exercise judicial omnipotence, it is in actual fact the undesirability of legal positivism in the democratic sense that he was celebrating. The limit of legal positivism in relation to constitutional development in Africa consists in the singular reason that it is not only politically neutral to democratic values but equally unsympathetic to it. This is because it sets a limit to the democratic agenda of the people in relation to the nature of law and the binding force of law in a given society.

As demands for democracy have swept across the continent of Africa since 1989, based on the experience of frustration by declining economies and the failures of incumbent governments, people from many different social strata have called for an end to authoritarian rule. The ushering in of a new democratic deluge in Africa and a regime of constitutional hope and development will have to take place outside the emphatic vetoes of legal positivism since it assumes an unsympathetic and neutral attitude to democratic values.

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,<sup>40</sup> 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

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<sup>40</sup> 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>.

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.

## **AFRICAN LEGAL AND CONSTITUTIONAL DEVELOPMENT: TOWARDS A CULTURAL JURISPRUDENCE**

Law is not just an attribute of human corporate existence; it is also a cultural phenomenon admitting in its trail the characteristics of cultural distinctions. What then is a cultural jurisprudence? What is the importance of a cultural jurisprudence for the process of constitutional and legal development in Africa? In the first place, there is the need to understand the meaning of jurisprudence. Etymologically, the word "jurisprudence" comes from two Latin words: "juris" meaning "law" and "prudentia" meaning "skill". It means, "a knowledge of, or skill in, law" and refers both to a philosophy or system of law and the skill of practicing law.

With its emphasis on skill, a jurisprudence is obviously a tool. Thus, behind every jurisprudence is the conclusion that jurisprudence deals with the creation and maintenance of a system of justice based on the rule of law. In this light, to understand a cultural jurisprudence in the light of the process of constitutional development in Africa is to understand the significant place and role of culture in the creation and maintenance of a justice system. What then is a cultural jurisprudence? What does one look like and what is its central emphasis?

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.<sup>41</sup> 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."<sup>42</sup> 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."<sup>43</sup> 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, therefore, concerns the formation, development and manifestation of the creative essence of man as

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<sup>41</sup> <http://www.mdx.ac.uk/www/study/sshglo.htm#Culture>.

<sup>42</sup> Webster's Third New International Dictionary, 1982.

<sup>43</sup> Edward Burnett Tylor, *Primitive Culture*, New York: Harper Torch Books, 1958, p.1,

pictured in that given society. This is often achieved through the regulation of mutual relations of man with nature, society and other peoples.

A cultural jurisprudence or cultural justice system is 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 their mutual self-supporting destinies. 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."<sup>44</sup>

In furtherance of this, the authors continues, "[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."<sup>45</sup> 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."<sup>46</sup>

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.<sup>47</sup> The fundamental concern of the nature of a cultural jurisprudence consists in asking what the nature of law and development is from a cultural standpoint. In the basic sense, worthy of note is the view that law is not separate from culture. Moreover, law as a normative category of human existence is not above culture; rather, law is part of culture. It is in this sense that it is contended that a legal theory which seeks to deny the utility of the connection between law and culture is antithetical to constitutional development.

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 jurisprudence is to claim that law and culture are patterned in a complementary way. In other words, law, culturally, is complementary to culture since they form the several components of the organic unity and whole for that society.

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 is part and aspects of a people's

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<sup>44</sup> Austin Sarat and Thomas Kearns, *Law in the Domains of Culture*, Ann Arbor: University of Michigan Press, 1998, p. 5.

<sup>45</sup> *Ibid.*, p. 5.

<sup>46</sup> 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.

<sup>47</sup> Raymond Williams, *Keywords*. London: Fontana, 1976, p. 87.

culture, and it is true that cultures are different, then the cultural perspective in the construction of the task of constitutional development is bound to engender some form of relativism in the evolution of a workable legal system. 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, it, however, does not deny the fact that law and culture are complementary in the evolution of constitutional development in a society and in the ultimate creation of a workable legal system. 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.

According to Malinowski, law can be said to comprise a broad and relatively undefined range of efforts to maintain social order.<sup>48</sup> 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.<sup>49</sup> However, for Malinowski, even though law represents range of efforts to maintain social order, law differs from society to society. The basis of Malinowski's contention consist 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.<sup>50</sup>

It is from these that we take the position that legal and constitutional development in Africa 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. Constitutional development cannot be represented using the prism of existing thoughts in mainstream jurisprudence. A sustainable constitutional and legal development 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.

The jurisprudence that is required for legal cum constitutional development in Africa is one that exhibit the culturally conditions and situations in which African political, social and economic experiences have been naturally enmeshed. Every jurisprudence manifests a different character which makes it naturally unique and to be distinguished. This distinction is obtained in the light of the recognition of the history of the society in question. 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 framework of life. This may well apply to the phenomena of law just as it applies to every other area of law.

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

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<sup>48</sup> Malinowski, Bronislaw *Crime and Custom in a Savage Society*, London: Kegan Paul, 1926.

<sup>49</sup> 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.

<sup>50</sup> Malinowski, Bronislaw *Crime and Custom in a Savage Society*, London: Kegan Paul, 1926.

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. A rethinking on constitutional and legal development in Africa requires a shift towards the adoption of the nuances and emphasis of a jurisprudence that is culturally relevant and significantly tied to the experiences and conditions of the respective society.

In a nutshell, a significant awareness of cultural technicality and competence is accepted as a constitutional duty or obligation and in the overall application of legal and constitutional principles in the whole process of constitutional and legal development. The interpretations of constitutions of states in the light of cultural consciousness and awareness are often regarded now as a *sine qua non* in the maintenance and sustenance of legal culture and development in general.

The cultural dimension to the understanding of law and legal matters is, no doubt, a herald of what is accepted as cultural jurisprudence today. Thus, the nature of cultural jurisprudence can be defined as the jurisprudence of the rights of culture in the whole interplay of legal rights, duties and obligation. Significantly therefore, cultural jurisprudence stems from the duty or obligation which attends to bringing in the consciousness of cultural differences, groups and activities to bear on the relevant interpretation and understanding of legal and constitutional development. Thus, a cultural jurisprudence, rather than de-emphasizes the attributes of cultures within a society in the creation of its legal and constitutional systems, it heightens that recognition of the sensitivity of a culture and their attributes in the whole construction of what is to emerge as the legal system and the process of constitutional development.

With respect to constitutional development in Africa, cultural jurisprudence emphasizes the multicultural heritage of most African societies and seeks to ensure that the heritage in question is a condition in the preservation and enhancement of such rights and heritage and in the interpretation of what is to count as constitutional or legal development. Thus, cultural jurisprudence, in this sense, dissociates from active constitutional consideration a theory which considers the understanding of this multicultural heritage as a transgression in the evolution of constitutional development in Africa. This multicultural heritage is very significant in the evolution of constitutional development in Africa.

One standard objection often raised against the notion of cultural jurisprudence is the view that it vitiates the existing notion of the “social control” function of the law, deconstructs the existing notion of the “objective reasonable person” standard of law and legal interpretation to evolve and create a multiplicity of culturally-specific sensibilities or standards or the standard of diversity. Thus, the common notions and concepts in cultural jurisprudence commonly refers to notions such as 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, 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.<sup>51</sup>*

The nobility and virtue of a culturally sensitive jurisprudence hinges on the fact that to treat legal issues in a culturally neutral way is to be discriminative of human rights in another perspective i.e. the cultural perspective. This equally applies to the evolving of the process of constitutional development which often times has been conducted without recourse to the sensitivity of cultural groups in the entire process. This has been due to the kind of legal ideological framework often brought into play in the concoction of the entire legal framework. Positivism is one of such conceptual legal framework often adopted in the evolution of constitutional development in African countries especially the countries whose colonial experiences were fashioned and influenced by the British tradition.

As a matter of fact, positivism reflects more of the Anglo-Saxon legal tradition which sees the culturalisation of legal concepts as inimical to the evolvement of legal constitutional matters. The legacy of colonialism in this legal constitutional respect often comes into play when constitutions for advancement and development are framed into abiding laws. In the words of Howes, "the ideal of a jurisprudence that crosses cultures, instead of pretending to treat litigants in a "culturally-neutral" fashion (which is not the reverse of discrimination, but rather discrimination in reverse) is a noble one."

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 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."<sup>52</sup> 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".<sup>53</sup>

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<sup>51</sup> 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.

<sup>52</sup> Howes, *op. cit.*, p. 10.

<sup>53</sup> Nicholas Kasirer, "Bijuralism in Law's Empire and in Law's Cosmos" (2002) 52 J. Legal Educ. 29.

Significantly, one of the highlights of cultural jurisprudence especially in its mutual application and importance for constitutional development in Africa is the view that cultures, though different in terms of practices, activities and functions, are essentially interactive and not disruptive nor destructive. This highlight stresses the importance of dialogue as a way of ensuring and preserving the rights of cultural groups in the creation of a wholesome political and legal culture within that particular society.

The interactive nature of cultures is evidenced by the fact that no one culture constitutes the universal culture for all societies, and to that end, all cultures share in a pool of cultural resource for the development of legal and constitutional advancement. In other words, cultural jurisprudence as developed in Africa engages the philosophical and radical minds that constitutional development, seen from the perspective of cultural jurisprudence, endorses a kind of interactiveness and dialogue.

Furthermore, another highlight of cultural jurisprudence consists in the accommodation and synthesis of the regime of cultural rights as indicators and index of constitutional development. Such accommodationism maintains the ideology that the constitutional order contains something for everyone in the dominant society. In other words, constitutional ethos and diction must take into cognizance the multiplicity of cultures in its provisions, expressions and protections. The body of such rights helps in maintaining and enhancing the process of constitutional development. In a nutshell, what cultural jurisprudence ensures basically, and which is at the heart of a comprehensive constitutional progress is the single most important view that problems of under representation and exclusion in the constitutional structure of a given society is avoided. A cultural jurisprudence has the added advantage of ensuring that even minority cultures are included in the process of constitutional engineering. A mono-cultural paradigm in the construction and development of the constitutional history of a given society could be self-stultifying in the sense that it “has the effect of alienating rather than incorporating minorities into the dominant society, and denies them their “right to culture”, in addition to interfering with other fundamental rights, such as equal protection, freedom of association, or freedom of religion”<sup>54</sup> ideas and ideals which are central notions of a robust and wholesome constitutional development.

According to Renteln, “governments and the courts should cleave to a principle of “maximum accommodation” of cultural differences so that individuals may pursue their own “life plans” in place of the “presumption of assimilation” or “monocultural paradigm” which currently holds sway. The latter paradigm assumes that individuals from “other” cultures should conform to a single national standard...”<sup>55</sup>

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<sup>54</sup> Alison Dundes Renteln, *The Cultural Defense*, New York: Oxford, 2004, p. 213.

<sup>55</sup> *Ibid.*