

CHOOSING A LEGAL THEORY ON CULTURAL GROUNDS: AN AFRICAN CASE FOR LEGAL POSITIVISM

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Introduction

If there are two or more legal theories or philosophies to choose from, what sort of considerations might induce one to prefer one to the other(s)? The standard answer to this question is that for the choice to be a reasonable one, it must be based on an estimate of theoretical advantage or moral benefits or both. In other words, the choice must be based on the judgment that one of the theories is superior to the other(s), in the way in which it would advance and clarify our theoretical inquiries on the nature of law, or in the way in which it would advance and clarify our moral deliberations about the law, or, in the way in which it would do both.¹ Neither of these two considerations is peculiar to the domain of legal theory. The adoption or rejection of theories on conceptual and/or on pragmatic grounds is an integral part of the enterprise of theory construction in all aspects of science; moral consideration is the essence of practical reasoning; legal theory is just an aspect of practical reasoning.

In the mainstream Anglo-Saxon legal theory, the debate on the choice of a legal theory has revolved largely around these two broad considerations – theoretical or moral advantage or both.² While this debate rages on, some African writers on legal theory have introduced a new and potentially interesting dimension to the discourse. These writers claim to have based their preference for one legal theory, and their opposition to another, on what we may simply refer to as cultural grounds. Without exception, these African commentators claim to have reached the conclusion that the positivist legal theory is unsuitable for the African (especially the Nigerian) legal system, and they have subsequently proceeded to advocate the adoption of the natural law theory.³

To the extent that legal positivism claims to be a universally valid and applicable theory, no doubt, its credibility would be substantially diminished, if it can be shown to be either incapable of providing an adequate description of, or of responding adequately to, the peculiar jurisprudential experiences and needs of certain cultures, or, to be peculiarly susceptible to morally undesirable consequences, when put into practice in certain cultural milieu. That legal positivism is defective in both of these ways, when applied in the African socio-political environment, is precisely what these writers are individually out to demonstrate.

In this paper, I propose to examine the arguments variously advanced by these African writers to support their culture-based rejection of the positivist creed in legal theory. I will argue that creative and interesting as these criticisms of the positivist theory may be, they are philosophically unacceptable. As against the near universal advocacy in favour of the natural law doctrine (legal positivism's conceptual archrival) by the Nige-

rian writers, I shall sketch the outlines of a positive case for the adoption of legal positivism by the legal systems of modern African states.

In the remainder of this paper, I proceed as follows. I will undertake some conceptual clarifications in section one. Here, I analyze what is involved in the choice or adoption of a legal theory. How might a legal system be said to have adopted a legal theory? In section two, I will explicate the salient tenets of the positivist legal theory. What major changes have taken place in the development of the theory, from its classic statements in the writings of Jeremy Bentham and his disciple, John Austin, in the first half of the nineteenth century? How have the African commentators tended to interpret the theory? I will subject the arguments adduced by these writers for the rejection of legal positivism to critical examination in part three. My conclusion will be that most of these arguments are either incomplete, irrelevant, or otherwise philosophically unsound. Finally, in the constructive part four, I present the outlines of an argument for the adoption of the positivist theory by our legal systems in modern day Africa.

Conceptual Clarification

There are two distinct (possibly complementary) ways in which a legal theory could be said to have been adopted by a legal system. In the first sense – say, with particular reference to legal positivism – a situation could prevail in which the positivist philosophy exerts an indirect, although possibly profound or even dominant intellectual influence on the practices and discourse in a legal system, through the works of leading jurists and legal scholars. In other words, influential jurists and scholars operating in a legal system might consider legal positivism the soundest theory of law. Such jurists and scholars may then reflect the positivist principles and teachings in their works, either as practicing lawyers, judges, or legal theoreticians. A situation might develop where jurists and legal scholars of positivist persuasion constitute a significant majority or, otherwise wield significant influence on the system's institutions and practices. This may be due to the strategic importance of the positions they occupy in the scheme of things (e.g., offices that attract high visibility, like a Supreme Court justiceship, a justice ministership, or even deans or prominent professors of pace-setting law schools). The general orientation of the legal system in which they operate might then become identifiably positivistic. When that happens, I would consider legal positivism to have been indirectly adopted by the legal system in question.⁴

The second sense in which a legal theory—again, say, legal positivism—could be said to have been adopted by a legal system is, paradoxically, more and less direct than the case in the first sense. It might come about in the following way. If a legal system's *rule of recognition*⁵ does not contain any provision, either expressly stated or implied, making the satisfaction of some moral standard or another a requirement for the legal validity of individual rules of law, such that a legal rule properly enacted, i.e., enacted in accordance with the system's norms and regulations for law-making, but which is morally deficient one way or the other, would still be considered a valid law of the system, then I would consider legal positivism to have been adopted by the legal system in question.⁶

This way of adopting legal positivism would be more direct than the first in the sense

that the criteria of legal validity as contained in the system's *rule of recognition* would be binding on all judges and other officials in the system, whose business it is to interpret and apply the laws, irrespective of their personal views on the appropriate relationship between the twin social institutions of law and morality.

On the other hand, this manner of adopting legal positivism would be less direct than the first mode of adoption, to the extent that adopting legal positivism in this way need not be the product of an internalised intellectual deliberation, or conscious philosophical commitment by any of the system's officials, or norm-subjects. In other words, a legal system could adopt legal positivism in this second sense, even where no jurist or scholar in it could be said to be a legal positivist in the first sense. The adoption of legal positivism in the second sense might be based on no more than the pragmatic consideration that the theory augurs well for the efficient administration of the law.

It is only in this second sense of adoption that the Nigerian writers could plausibly consider legal positivism to have been adopted by the legal systems of modern African states, when they report that legal positivism is the dominant legal theory in contemporary Africa.² Taken in the first sense of the indirect but dominant influence of philosophically committed jurists and scholars, I should doubt whether there is enough exposure to the legal positivist philosophy or any other philosophical creed for that matter by African jurists and practicing lawyers, to leave such deep intellectual impression on their thought processes as would enable them to consciously reflect the tenets of such a theory in their work.

The curricula in African law schools and faculties usually consist almost exclusively of what Karl Lewellyn once described as bread-and-butter courses.³ Given this common emphasis on technical legal training, often considered to be of immediate practical utility to a developing society, it is only to be expected that there would be but the barest degree of exposure for lawyers in training, to the tenets of the philosophies and fundamental assumptions which underlie the practical matters that constitute the contents of law school instruction.

I hasten to note here however, that this practicing lawyer's attitude to philosophical questions is by no means peculiar to African legal practitioners; philosophically sophisticated lawyers tend to be the exceptions even in the so-called highly developed legal systems. The typical lawyer's cynicism about "deep theory" is captured eloquently by Dicey.

Jurisprudence" [Dicey observes] is a word which stinks in the nostrils of a practising barrister. A jurist is, they constantly find, a professor whose claim to dogmatize on law in general lies in the fact that he has made himself master of no one legal system in particular, whilst his boasted science consists in the enunciation of platitudes which, if they ought, as he insists, to be law everywhere, cannot in fact be shown to be law anywhere.²

Stig Stromholm's observations on the respective jurisprudential traditions of ancient Greece, and the Roman Empire are rather apt here. According to Stromholm, if what prevailed in ancient Greece could be described as philosophy without law, i.e., all the-

ory no technique, then what prevailed in the Roman Empire should be described as law without philosophy, i.e., all technique no theory.¹⁰ My contention is that in many African legal systems too, what we have is law without philosophy; as it was in the Roman Empire, all technique, little or no basic theory.

Legal Positivism

The positivist theory of law has had a checkered career. In almost two centuries of its modern development, it has metamorphosed through different phases of changes, refinements, and creative modifications. I shall state, in very broad outlines, the salient elements of three of the more prominent versions of the theory. The goal of this exposition is to enable us isolate the common elements in all of these versions, and to get to the irreducible minimum properties of a positivist conception of law. Against this common core of the positivist doctrine, I shall compare the interpretations of it to be found in the works of its African critics.

Imperativist Positivism

The classic statement of a positivist account of the nature of law is to be found in John Austin's much analysed imperativist theory—the notorious command theory of law. Positive law which, in Austin's view, is law properly and strictly so called (and which is the only appropriate matter of scientific jurisprudence), is the command of a sovereign.¹¹ A sovereign, says Austin, is a determinate person or group of persons¹² who is rendered habitual obedience - but who does not render any such obedience to any one - by the bulk of the population of a politically independent society.¹³ As for the notion of a command, Austin analysed it into three elements:¹⁴

1. a wish conceived by a rational being that another rational being shall do or forebear from doing;
2. an evil, or, in current parlance, a sanction, to proceed from the commander and to be incurred by the commanded party, in case the latter fails to comply with the wish expressed by the former;
3. intimation of the wish, by words or other signs.

On Austin's model of legal positivism, law is made when a sovereign issues a command.

In summary, the principal features of Austin's theory are these.

1. The source of the law is in social fact.
2. Law derives from the sovereign's express or tacit commands.
3. Sanction is an indispensable aspect of the law. In other words, it is Austin's view that a sanctionless law is something of a contradiction in terms. This has to be so, given the centrality of the element of sanction in Austin's analysis of the notion of command.

4. There is no necessary connection between law and morality. Or, to express the idea in a more positive form, law and morality are conceptually separable. This *separability thesis* would prove to be the most enduring element of Austinian positivism. Austin himself was uncompromising on the validity of the separability thesis. His famous battle cry is the ringing maxim:

The existence of a law is one thing, its [moral] merit or demerit is another. Whether it be or be not is one enquiry; whether it be or be not conformable to an assumed [moral] standard, is a different enquiry. A law, which actually exists, is a law, though we happen to dislike it, or though it vary from the text, by which we regulate our approbation and disapprobation.¹⁵

Legal Realism

The realist version of legal positivism is the product of the American realist movement of the 1920s and 1930s. The movement was so named because most of its leading exponents were legal scholars and jurists based in North America, specifically in the United States.¹⁶ The realists conceive the law as consisting in the predictions of the decisions (and sundry pronouncements) of law courts, in cases brought before them for adjudication. As Justice Holmes famously put it, “the prophecies of what the courts will do indeed, and nothing more pretentious, are what I mean by the law”.¹⁷ Individual members of the realist movement qualify this basic proposition in different ways. But these three features of the theory are fairly constant.

1. Law is a social fact; the law, as the realists are wont to say, is not a brooding omnipresent in the sky.
2. The source of the law is judicial decision. Law, in other words, is the end product of the process of adjudication.
3. Law and morality are conceptually separable – the separability thesis.

Normative Legal Positivism

The most current version of the positivist theory is the normative positivist analysis of the nature of law. This version of legal positivism has its best expositions in the respective writings of Herbert Hart,¹⁸ and Hans Kelsen.¹⁹ The normative positivist analysis of the concept of law was developed in reaction to the unsatisfactory state of the debate in jurisprudence at about the middle of this century. Having apprehended the unproductive reductionist tendencies in classical legal positivism of the Austinian kind and theological natural law of the Thomist and Blackstonian variety respectively, the normative positivist seeks to forge a middle path between the two extreme positions. The goal of normative positivism is to construct a legal theory that is basically positivistic in conception, but which would be sufficiently flexible conceptually to also account for the normativity of the law.²⁰

For my purposes here, I state the outlines of H.L.A. Hart’s version of normative positivism. According to Hart, the beginning of wisdom in the effort to develop an ade-

quate theory of law is to learn to conceive the law as a form of social rules²¹. Hart's theory of law could be summarized in the following three propositions.

1. Law is a social fact.
2. The paradigm exemplification of the law consists in the union of primary and secondary "social rules."²²
3. Law and morality are conceptually separable.

Professor Hart's articulation of the substance of the separability thesis is very instructive. According to Hart, the import of the separability thesis is, "the simple contention that it is in no sense a necessary truth that laws reproduce or satisfy certain demands of morality, though in fact they have often done so."²³

Elsewhere Hart analyses the content of the separability thesis into two disarmingly simple claims:

First, in the absence of an expressed constitutional or legal provision, it could not follow from the mere fact that a rule violated standards of morality that it was not a rule of law; and [second] conversely, it could not follow from the mere fact that a rule was morally desirable that it was a rule of law.²⁴

A quick review of the three versions of the positivist theory stated thus far shows that only two theses seem to be common to all of them, namely, the social fact thesis, and the separability thesis. The import of the social fact thesis is the claim that the existence of the law is purely a matter of social fact. The sources of the law are invariably to be sought in the inner workings of concrete social institutions. The variations between the different versions of the theory are explainable in terms of the differences in the specific social institutions each identifies as the source of the law, i.e., whether it be in the expression of the will of a monarch, or in the enactment of a modern parliament, or in the decisions of a law court, or in the complex interplay of social rules of some form.

Most self-confessed positivists and sympathetic commentators would most probably agree that these two theses constitute the irreducible core of the positivist creed. There may, however, be slight disagreements on which of the two theses to accord logical priority. Kent Greenawalt, for example, is of the opinion that the social fact thesis is logically prior to the separability thesis. In his view:

if one had to settle on a central aspect of legal positivism, as a general approach to legal theory that has existed over time, one would focus on the premise that law is in some important sense a social fact or set of social facts. *Suppositions about the connections between law and morality and about the nature of judicial decisions follow from that.*²⁵

Similarly, in his topical essay, "Classical Legal Positivism at Nuremberg",²⁶ Stanley L. Paulson claims that "classical legal positivism rests on two fundamental doctrines, the

command doctrine and the doctrine of absolute sovereignty.”²⁷ This means, again, that the separability thesis is a derivative of those “two fundamental doctrines”.

These observations about the logical priority of the social fact thesis are most likely correct. But for analytical purposes it may be more helpful to reverse the order of things, since all legal positivists are equally committed to the separability thesis, and since there are important disagreements among positivists in regard to the determination of the content of the social fact thesis.

Let us take the separability thesis as a “negative” principle, it asserts what the law need not be. I suggest that we make this “negative” principle serve as the indispensable stump of the positivist account of the nature of law. Different versions of the theory may then be obtained by grafting onto this conceptual stump a variety of different “positive” theses. Austin’s imperativist brand of legal positivism, Hart’s normative positivist analysis of the concept of law, and the predictivist account developed by the American realists, are three of the well-known examples of such derivable versions of legal positivism. In the first, the “positive” thesis that law is the command of a habitually obeyed, legally illimitable sovereign is grafted onto the separability thesis. In the second, the “positive” thesis that law is invariably to be conceived as the union of some form of social rules is grafted onto the separability thesis. In the third, the “positive” thesis that law is to be distilled from the decisions reached by courts in matters brought before them is grafted onto the separability thesis. A rich possibility exists for theorists to graft other logically compatible “positive” theses onto the separability thesis, to derive yet other versions of legal positivism.

The African Critics’ Understanding of Legal Positivism

Against this background of a theory that has undergone profound changes in the course of its checkered evolution, and the rich possibility which, as I have suggested, exists even now to construct new variations of it, the understanding of the tenets of legal positivism displayed by many of its African critics is grossly inadequate. For many of these commentators²⁸, it is as if the development of the positivist theory had remained frozen at the point of Austin’s expositions, in 1832.²⁹

For example, F. U. Okafor, a leading Nigerian critic of the theory, claims to understand legal positivism as “a theory which recognizes as valid laws only such enforceable norms as are enacted or established by the instrument of the state.”³⁰ The consequence of this conception of law, Okafor claims, is that for the positivist, “only statute laws are laws indeed, by the mere fact that they have been posited by an appropriate political authority.”³¹ In the face of these conceptual restrictions, Okafor contends, the legal positivist is led to exclude from the province of jurisprudence, “such fundamental questions as, ‘what are the essence of law?’, ‘why is the citizen obliged to obey the law?’, ‘what is the nature of a just and unjust law?’, ‘is what is legally wrong also morally wrong?’.”³²

In the same vein, Justice Akinola Aguda, easily one of Africa’s leading jurists, conceives the various versions of legal positivism as “theories of the omnipotence of the sovereign.”³³ The Rev. Dr. N. S. S. Iwe has a similar understanding of the tenets of the posi-

tivist theory of law:

By legal positivism, [Iwe writes,] we mean essentially that attitude of mind and spirit which regards as valid laws only such enforceable norms formally enacted or established by the appropriate official political organ. Here only Municipal laws (or Statute Laws) are laws for they have been formally so posited by the authority. Once a given norm or proposal has formally and successfully gone through the technical procedures, of legislation, it automatically acquires the force of law, independently of all other considerations moral, teleological and practical. This is the stand of legal positivism and its school of supporters.³⁴

The sole concern of legal positivism, Iwe continues:

is with the law as 'it is' and as 'laid down' not with what it ought to be. The separation of ethics and jurisprudence is complete in legal positivism. The legal 'is' is all that counts. The legal 'ought' is of no consequence and relevance in positivist jurisprudence. The formal stamp of technical legality on a given norm – not its ethical contents and qualification – is the criterion of legal validity.³⁵

Taken in its current stage of development and sophistication – and this is the sense in which any serious-minded contemporary commentator ought to take it- the interpretations of the positivist doctrine that we have been quoting from the African writers are grotesque caricatures. But it is these caricatures that many of these writers claim to be theoretically inadequate and practically harmful to the peculiar circumstances of African legal systems. In the next section, I will examine, under two broad headings, some of the arguments that these critics adduce in support of their negative conclusions on legal positivism.

The Ontological Argument Against Legal Positivism

Although one finds passing allusions to this line of thinking in the works of other African critics of legal positivism, the clearest articulation of the ontological argument for the rejection of legal positivism was developed by Dr. F.U. Okafor.³⁶ The argument is based on what he considers to be the unique characteristics of African ontology and, by extension, the unique characteristics of the social institutions that evolved from that ontology. In order to understand the traditional jurisprudence of Africa, Okafor claims, we must first understand the salient features of African ontology. As he puts it, "the African legal tradition is a direct outcome of African ontology."³⁷ By "African ontology", Okafor seems to mean nothing more than the African folk cosmology – the traditional African view of the universal order, and man's place in it. As Okafor understands it, "the morphology of African 'reality', their concept of 'existence', shows that there is an intimate ontological relationship between beings."³⁸ In other words, African traditional worldview recognizes that there is "active interaction, a kind of intersubjective communion", among the various entities that constitute the universe. The hierarchy of beings, or as he would prefer to label these entities, "forces", range, in a de-

scending order of might and importance, from the divine force, to terrestrial and celestial forces, to human forces, terminating with vegetable and mineral forces.³⁹ The place of man is right at the vortex of this cosmic order; to survive, man must harmonise his own being (or force) with the reality of the other forces that engulf him.⁴⁰

From this “ontological” base, there developed, according to Okafor, unique social and political ideas and institutions in Africa. As regards the evolution of the institution of law in Africa, with which we are here primarily concerned, Okafor submits that: “From the ontological relationship among forces, divine and human, animate and inanimate, and from the fact of the interaction of these forces arise a practical recognition of two main sources of law – divine and human.”⁴¹ On this model of the traditional African legal system, there is only one vital criterion of legal validity, namely, that the purported law be intended by its maker (whether the lawmaker be God or man) to contribute to the maintenance of the harmony among the various ontological forces. Hence, “the province of African jurisprudence is .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.”⁴²

From this conception of the nature of law, certain cardinal features of traditional African legal system are said to emerge. The first is that African laws are not the commands of any sovereign. In the traditional African political system, Okafor had earlier reported, there would have been no sovereigns to issue such commands in the first place. “The African political culture”, he claims, “recognises only leaders and not rulers, seniors but not superiors.”⁴³

The second characteristic of the traditional African legal system is the conspicuous lack of emphasis on enforceability. This is due, again, to the absence of centralised authorities – symbolized, for example, by the Austinian sovereign – to supervise the enforcement of the laws of traditional African society. In view of the absence of a law-enforcing central authority, the African (in traditional times) endeavoured to observe law and order because of his ontological and moral conviction that a breach of the law would upset the ontological order⁴⁴. And, it was the general belief of course, that to upset the ontological order was to provoke calamitous reprisals to fall, not only upon one’s own head, but also upon the whole community of which one is a member.

The third salient characteristic of the traditional African legal system is the belief in the existence of a necessary connection between law and morality. Or, as Okafor puts it, there was the belief “[that] there cannot be any separation of morality and legality in the African legal experience.”⁴⁵ Again, the explanation for this belief in the conceptual union of law and morality goes back, ultimately, to the ontological undercurrent of the jurisprudence of traditional Africa. “It is because African positive laws have ontological foundations that they have *ipso facto* a moral foundation, for in African ethical thought, what is considered ontologically good will therefore be accounted ethically good; and at length be assessed as juridically just.”⁴⁶ In view of this jurisprudential heritage, Okafor’s conclusion is that the African legal system must reject legal positivism in all its ramifications. This, as he says, is because, “the legal positivists tenets and their corollaries are in complete opposition to the African ontology and African jurisprudence that depends

on it.”⁴⁷

The opposition of the positivist philosophy to African jurisprudence is manifested in several ways. First, legal positivism, says Okafor, conceives law as the commands of a sovereign ruler, issued to his obedient subjects. This is clearly opposed to the tenets of African jurisprudence, by the terms of which the existence of such a sovereign ruler is denied, and where laws are reportedly conceived as the ordinances of reason. Second, legal positivism is said to posit enforceability as a necessary condition for the existence of law. But African jurisprudence denies the necessity of enforceability. Third, and most important, legal positivism denies that there is a necessary connection between the validity of a rule of positive law and the satisfaction of some presumed standards of morality. On the contrary, African jurisprudence is said to affirm that there is a necessary connection between morality and the validity of positive law.

It is easy to guess Okafor's conclusion from all this: there can be no room for the positivist creed, as far as the development of the African legal system is concerned. Okafor counsels that “in the African world serious efforts must be made to ensure that our laws, statutory or customary, take due cognizance of African ontology. Only a law with such ontological foundation would be a law of the people for the people.”⁴⁸

Okafor's submission is very interesting, at times even fascinating. Surely he has taken the discourse to hitherto unsuspected realms. I should doubt, however, whether what is left of Okafor's case against legal positivism would stand up to critical scrutiny, once the argument is stripped of the exotic but largely illusory garb of “African ontology”. Indeed, I will argue that Okafor's argument against legal positivism is flawed on all counts: his description of the traditional jurisprudence of Africa does not correspond to anything in reality; his interpretation of the legal positivist doctrine – which he sets the so called African jurisprudence up against – is clearly out of vogue, outdated perhaps by more than one and a half centuries. I start with Okafor's exposition of legal positivism.

Okafor's understanding of legal positivism goes no further than the account developed in John Austin's *The Province of Jurisprudence Determined*, a monograph, as we have established above, first published in 1832. The positivist movement in legal theory has, of course, undergone major transformations since Austin's time. The transformations have been especially profound in the works of modern normative positivists. As a result of these transformations, it is no longer true – assuming that it once ever was true – that the positivist theory offers a model on which only duly enacted statutes may qualify as valid laws. On the model of modern legal positivism, customary laws, positive international laws, and conventional constitutional law – whatever that may mean – may now qualify as valid laws of a municipal legal system, i.e., provided that such norms are so identified by the system's *rule of recognition*. By the same token, all those questions which Okafor considers to be fundamental, “‘what are the essence of law?’, ‘why is the citizen obliged to obey the law?’, ‘what is the nature of a just and unjust law?’, ‘is what is legally wrong also morally wrong?’”, now fall squarely within the province of positivist jurisprudence. In fact, neither Austin nor Bentham, nor any other positivist of note has ever canvassed the exclusion of these questions from the province of jurisprudence. By limiting the survey of what he touts as “the genesis and develop-

ment of legal positivism”⁴⁹ to its most reductionistic form in the writings of John Austin, Okafor’s exposition can be said to exhibit what Olufemi Taiwo has described as “a serious deficiency in scholarship.”⁵⁰

Let us turn our critical attention to Okafor’s description of the traditional jurisprudence of Africa. My contention is that there is no one such thing; there has never been one such thing. Here again, Taiwo has said much that needs to be said about the fictional character of Okafor’s portrayal of a philosophy of law indigenous to the whole of Africa, quite eloquently. Simply put, the African continent has always been too culturally diverse and heterogeneous for anything remotely approximating to a dominant legal philosophy, identifiable with the whole continent, to have emerged. As Taiwo rightly observed, “to collapse all of Africa’s diverse socio-political and legal traditions into one, which prevailed over all the areas, is to mistake the common occupation of a geographical continuum for social consensus.”⁵¹

There is a second and equally significant sense in which Okafor’s descriptions fail to capture the current realities of African socio-political ideas and institutions: it ignores the fact of centuries of exposure by African societies to profound cultural influences from other lands. Surely it would be difficult to ascertain what remains as the culturally pure and unadulterated African in a social or political idea or institution in a typical modern African society, once we reckon with how such an idea or institution must have been shaped in some way, by the “corrupting” influences of European colonialism, and before European colonialism, by the “corrupting” influences of Arabo-Islamic cultures.

Of course no one wants to suggest that these cultural influences have been mono-directional, Arab to Africa, or, Europe to Africa. What we here refute is the suggestion by Okafor and the other purveyors of this naïve cultural irredentism, that if we can only search long enough in our cultural archives we will somehow uncover some elements of our cultural past that have been left pure and untainted by alien influences.

Okafor’s mistake, in the first instance, is to have generalized from the socio-political set up of his own native Igbo society, in Eastern Nigeria, to the whole of Africa. But whereas ethnographic accounts confirm that the social and political arrangement of traditional Igbo society was based on the age-grade system, thus indicating that the Igbo society of old might indeed have recognized “only leaders and not rulers, seniors but not superiors”, there are likewise conclusive historical records to confirm that in other parts of the continent, kings and emperors reigned, whose law-making powers and competence rivaled those of any monarch in Medieval Europe.

Also to be noted, on a second count, is the historical fact that the social and political structure of indigenous Igbo society has since been profoundly altered, thanks to the activities of the colonizing British authorities, who created the institution of paramount rulers—the so called Warrant Chiefs—in Igboland. The purpose then was to replicate the economic successes and administrative efficiency of *indirect rule*, which the British had employed in Northern and Western Nigeria, societies where large kingdoms and empires had long evolved, complete with sophisticated political systems. As a result of that (entirely self-serving) innovation by the British, Eastern Nigeria of today can boast

of a whole range of paramount rulers. Okafor's description is, therefore, not only a monument to hasty generalisation, it is also anachronistic, that is, even if we restrict its scope to Igbo society.

For our purposes here, there would seem to be no use in subjecting this argument to further scrutiny. Its defects are obvious. To set up what must amount to a caricature of legal positivism – as the doctrine has been developed in recent decades – against the model of some mythical African jurisprudence, has as much credibility as the activities of an agent, who, having first toiled very hard to erect a strawman proceeds at once to attack it vigorously.

But before I conclude this examination of Okafor's ontological argument for the rejection of legal positivism, there is one important though unstated assumption in the argument that deserves to be closely examined. That assumption would be philosophically significant – if it turns out to be true – even if the objections that I have been raising against the other premises of the argument are sound and conclusive. The assumption is that the African ontology and the traditional African legal philosophy that is based on it describe the model of a world that is worth “returning” to. We shall notice that the mere fact—assuming it is a fact—that the legal positivist creed is in “complete opposition” to the tenets of African jurisprudence would not, in itself, constitute a sufficient reason for rejecting legal positivism. What would amount to a sufficient reason for that purpose is a conjunction of that supposed fact with the truth of another proposition, namely, that the African conception of law is a better theory of the nature of law. Supposedly, in Okafor's view, that would be because African jurisprudence is predicated on the soundest ontological theory, or an ontological theory that is, at least, superior to its presumed counterpart from the western world.

Let us look then more closely into the structure and contents of the “traditional African world”, which in my view, would seem to correspond to Okafor's description of the African ontology. For even if it is the case, as I have argued, that the portrait fails to capture anything real, and even if it is the case, as I have argued, that Okafor's interpretation of legal positivism is an outdated caricature, his description of the African ontology and the resultant African jurisprudence may yet present the picture of an ideal condition which is superior to what would amount to a true representation of legal positivism. And in that case, of course, that ideal condition would be worth striving to attain.

The picture that seems, in my view, to emerge from Okafor's descriptions is that of a very simple social order, with all but the barest rudiments of political organization. Scientifically, this has to be an utterly simple world: chances are that in that world, explanations, no matter how mundane or common-place the phenomenon being explained, would invariably implicate the personal dispositions of some god, ancestral spirit, or one of a myriad of other supernatural agents.

In such a world and given its aboriginal conception of law, it should not surprise us if we are told that the law of gravity readily qualifies for inclusion in the province of jurisprudence (surely the law of gravity contributes to the maintenance of harmony among the various life forces), whereas many a law that we may design to regulate

modern commerce might fail to make it into the province of jurisprudence. This is, after all, a world in which morality and religion are conceived to be inseparable, and where no law is to be considered valid unless religion and morality sanction it. It would be a world, in short, in which as far as legal conceptions go, the institutions of morality, religion, and law are conceived as woven into an inseparable, tangled mesh. Even Austin's crude imperativism would be far superior to that jurisprudence.

Clearly, an ontology like that and the social and political ideas and institutions that might sprout from it do not present the modern African, or, for that matter, any one from any part of the modern world, with the model of an ideal world worth striving to attain. Nor should we be surprised at our abhorrence at what we conjecture might be the state of that world. To the extent that the portrait corresponds to any reality at all, it can only correspond to a state of the rudimentary social order in which humanity once existed, not only on the continent of Africa but in all parts of the globe, when earthly civilization was at its earliest infancy. Having transcended that condition for millennia, for the vast majority of human communities in all parts of the contemporary world, the only surviving evidences of such a past are marks on the walls of ancient caves. This is no less the case for African societies. Indeed, had someone, not "a native son" like Okafor or myself, but say, a foreign social scientist, presented us with that picture of an Africa in some immediate past (say, a hundred or two hundred years before the onset of colonialism), we would all, quite rightfully, have protested vigorously. We would have countered his descriptions with overwhelming historical evidence, confirming that great empires had existed and flourished all over the continent, for thousands of years before the advent of colonialism. Now suppose that not content with presenting his unflattering descriptions as mere conjectural reconstruction, our foreign social scientist informs us that he had also reached the normative conclusion that it would be better for the modern African to organize his society on the model of that simple past. Smelling the dirty hands of racism at work, and feeling gravely insulted, we Africans would, no doubt, have called for his head.

Okafor's idea of "the African ontology" belongs, I suppose, within the genre of ethno-philosophy. In general the ethno-philosophy project has not done too well; some would rate it an outright conceptual flop. Ethno-legal-philosophy is not likely to fare any better. This pessimistic conclusion on the viability of ethno-philosophy as a general methodology, and ethno-legal-philosophy in particular should, however, not be misconstrued as indicating a wholesale rejection of all attempts to probe into, and as far as possible, to reconstruct the past. My position is not borne out of any form of naïve triumphalist modernism. By no means do I advocate an unqualified celebration of everything new and modern, nor do I want to suggest that Africa should ignore her past. Quite apart from the fact that history will not be so wantonly ignored for long, I do strongly believe that there may be a lot of valuable socio-political ideas from Africa's past, which when carefully extricated from the debris of ancient superstitions, can profitably be appropriated for modern use.

To take a concrete example, Dr. T. O. Elias has shown, quite persuasively, why a preoccupation with imprisonment as a way of dispensing criminal justice may not sit well with African customary legal practice. Elias points out that to the extent that "punish-

ment of the offender and a corresponding satisfaction of the offended are two distinct questions that must be faced if real justice is to be achieved,”⁵² then pre-colonial African customary legal practices may have struck a more useful balance between these two requirements of justice.

While viewing the matter of punishment of offenders with grim seriousness, African customary legal practices have tended to put an equal or greater emphasis on the side of the need for restitution. From the point of view of the kinsmen of a victim of manslaughter, it is equally, if not more important, that the murderer be made to pay them “blood- money”, before he is sent to jail or executed. Hence the African under the colonial legal system was understandably appalled when offenders were “merely” imprisoned by the colonial authorities, without anything said or done about the need to make restitution to victims or to a victim’s family:

When a person has been found guilty of, for example, manslaughter of another and is thrown into gaol without at the same time being made to pay the blood-money to his victim’s surviving relations as required by customary law, not only such deprived relatives but also the general public are infuriated by the procedure. Imprisonment benefits the British Government by thus providing it with another servant, while it does nothing to assuage the personal grief or satisfy the legal expectations of the bereaved family.⁵³

This perceived need to take the matter of restitution as seriously as we take society’s need for punishment suggests, in my view, that there is an urgent need to take a closer look at the procedures for the administration of criminal justice as presently constituted in the legal systems of modern African states. In view of the apparent lack of sufficient awareness of the requirements of the different forms of laws under which an injured party may seek remedy by the majority of the citizens of African states, it may be desirable to mitigate the rigid distinction, inherited from colonial legal systems, between civil and criminal procedures.

We must, however, append a couple of *caveats* to all of this. The validity of Dr. Elias’s observations concerning the customary emphasis on some form of restitution, e.g., payment of blood-money, is most likely limited to certain regions of the African continent, and even in those regions, true only of certain historical points in time. This takes nothing away from Elias’s otherwise excellent, pioneering study of African customary law. He cannot have claimed, without concrete empirical evidence, that payment of blood-money (or any other form of restitution for that matter) was a practice universally engaged in by all traditional African societies. Nor can he claim, in the face of what seem to be strong evidence to the contrary, that the average Yoruba man at the commencement of the twenty-first century nurses a sense of loss at not being paid blood-money, as vividly as his ancestors might once have done.

Second, there is all the evidence to show that Africans under colonial rule were not alone in been “piqued”, as Dr. Elias put it, by the relative indifference of the British criminal justice system at that time, to the need to extract restitution from offenders in addition to, or, as a way of punishing them. Reform-minded philosophers and social critics, led by Jeremy Bentham⁵⁴ had directed critical attention to this unsatisfactory

aspect of the British legal system, as early as the beginning of the nineteenth century, or earlier.

If a man were to willfully set fire to his neighbour's house or farm, the penalty under British colonial law would be a term of imprisonment. Partly this would be retribution; partly it would be imposed to serve as deterrence to other potential arsonists. Bentham is however of the view that justice would be better served if the offender was fined a certain sum, to be paid over to his victim. In Bentham's view, "the best fund whence satisfaction can be drawn is the property of the delinquent, since it then performs with superior convenience the functions both of satisfaction and punishment."⁵⁵ On this view, it would be "juster and simpler" to auction off an arsonist's house, farm or automobile, and remedy the victim's distress and loss from the proceeds.

Bentham is willing to go several steps further by way of securing just restitution. For instance, in the case of an impecunious offender, Bentham proposes that funds should be drawn from the public treasury to make good the victim's loss: "But if the offender is without property, ought the injured party to remain without satisfaction? No, *for satisfaction is almost as necessary as punishment*. It ought to be furnished out of the public treasury, because it is an object of public good, and the security of all is interested in it."⁵⁶

I have entered these caveats at length to caution us on the ever present dangers of cross-cultural and cross-epochal generalisations, as well as to counter the dubious suggestion which some cultural romantics promote, that we shortchange our ancestors if we do not claim some items of wisdom and insights into the dynamics of social organizations, as their exclusive preserve. African peoples, in the past and at present, are not different from the rest of humanity in the possession and exercise of innate powers of philosophical reflection, and in being endowed with a healthy dose of common sense. But then what sane person has ever denied that?

I conclude this section by noting that in the effort to see what can be salvaged from the legal systems and practices of indigenous African societies, legal philosophers in particular and jurists in general will do well to consult the various writings of cultural anthropologists who studied those aspects of our cultural past. The excellent bibliographical references at the end of Dr. Elias's equally excellent monograph on *The Nature of African Customary Law*, is a good place to start.

The Moral Argument

The next line of objection to legal positivism is not one distinct argument as such. It is a cluster of overlapping complaints about some alleged pernicious effects of the positivist doctrine, when observed in practice. Among the morally undesirable results that critics have claimed to notice when they observe the positivist doctrine in practice are the following:

1. that it encourages tyranny by allowing undue and excessive powers to government officials. As J.M. Elegido put it, "positivist approaches in law tend to do great harm, especially in so far as of themselves they tend to legitimate

the actions of whoever finds himself in power;”⁵⁷

2. that it is a bad theory of legislation;⁵⁸
3. that it is a bad theory of adjudication.⁵⁹
4. The cumulative effect of (i), (ii), and (iii), critics have concluded, is that when the positivist doctrine is put into practice, it helps to create a social and political environment that is hostile to the exercise and defense of human rights.

Now, anyone with a passing acquaintance with the literature on legal philosophy would readily see that these are fairly standard objections to the positivist theory. One is therefore tempted to dispose of them by drawing from the stock of standard positivist rejoinders, which, in my opinion, are quite adequate. We must resist that temptation. First, we have to find out what else the African critics of the positivist creed have in mind by raising these well-worn allegations anew.

The idea seems to be that there are some uniquely African reasons for recycling these objections at this time. Justice Akinola Aguda provided the clearest statement of such a reason. I quote him in full:

What has become of grave importance to us in Africa – but here I shall confine myself to Nigeria – is that the emergence of military and dictatorial governments in this continent has brought the positivist theories into focus, and caused alarm not only in the minds of progressive jurists but also in the minds of the general public. England and some other European countries at least since after the Second World War have been able to contain the positivist concept of law, thanks to inbuilt and highly developed democratic practices. Here in Nigeria no such practices have ever been permitted to germinate, not to talk of grow; hence we have not been able to curtail the evils of positivist thinking on law which most lawyers – in this I include judges of all grades – have imbibed from the commencement of their training in the law Faculties.⁶⁰

The import of Justice Aguda’s submission is clear enough: what makes legal positivism so morally harmful when put into practice in an African society – like Nigeria – is the absence, in the African socio-political environment, of inbuilt and highly developed democratic institutions and practices. It is as if legal positivism were a variety of plant, to draw an analogy with botanical processes, nurtured in the democratically fertile climates of Western Europe, and North America, this plant is thoroughly domesticated; it bears succulent fruits. Transplanted onto the harsh and rocky terrain of political dictatorship and tyranny in Africa, it becomes a man-eating weed. Now, what are we to make of this argument?

To begin with, we should note that to date, critics have not come up with any independent argument to show that legal positivism is a bad theory in itself. Often, critics have had to concede, as we find Justice Aguda conceding in the passage quoted above, that the positivist philosophy does not produce the morally objectionable consequences that they claim to result from its application in African legal systems elsewhere.

Perhaps the critics' point is not that legal positivism is a morally evil doctrine in itself; the allegation may be that the evils that the critics complain about result when subscription to the positivist creed is combined with the absence of sufficiently developed democratic institutions and practices. That much is clear from the line of reasoning quoted from Justice Aguda above, when he contrasts what he takes to be the morally pernicious effects of legal positivism in Africa to its benign effects in the operations of the legal systems of the industrialised democracies of Western Europe. The next step in this anti-positivist position is usually the suggestion that the moral evils complained about would not result if, instead of the positivist creed, the legal systems of African states under one form of dictatorship or another had subscribed to the alternative natural law philosophy.

The problem with the first part of this argument is that it may have put the blame where it does not belong. It seems most likely that the critic here confuses the breakdown of the political process for a failure of legal theory. I would have thought that it is more reasonable to blame the dictatorial tendencies in African governments and the resultant evils of political corruption and human rights abuses, on the frequent disruptions of the political process—usually, through military incursion into civil governance—which has so far prevented democracy from flourishing, and not on the positivist creed in legal theory. Surely, no one would suggest, with any degree of seriousness, that the positivist conception of law is to be held causally responsible for the absence of “inbuilt and highly developed” democratic institutions and practices in post independence African states.

For parallel reasons, I should doubt whether subscription to the natural law philosophy would be sufficient in itself, to curtail the occurrences of the moral evils of gross abuses of political offices, misuse of power, and violation of human rights, in a fundamentally undemocratic polity. Indeed, the natural law doctrine is the most vulnerable to use and abuse by just about anyone with a political agenda. Anarchists, reactionaries, liberal democrats, as well as libertarian minimalists, have all been known to invoke the principles of natural law to justify their respective causes.

Professor Alf Ross likened the natural law doctrine to a conceptual harlot, whose services are readily available to all manners of political ideologies. Hence, as Ross put it, “from a practical-political point of view, naturalistic theories have been conservative as well as evolutionary and revolutionary. In the province of political philosophy all the political systems from extreme absolutism to direct democracy have been vindicated by natural law philosophies.”⁶¹ It does seem, therefore, that to base the hope for democracy and the aspirations of human rights on the natural law philosophy is like building a magnificent castle on a pile of shifting sand.

Often in their haste to condemn legal positivism, critics tend to confuse a number of issues that should be separated and carefully analysed. They have thus been led through such series of conceptual muddles to proclaim what, under closer analysis, turn out to be patently false allegations against the theory. For example, the impression is sometimes created that the legal positivist does not have the resources within the framework of his theory to draw the vital distinction between a lawful order and a regime of mere brute force. The imputation of such a crude theory of legal validity, according to which

positivists are held to equate a regime of law to the gunman situation writ-large, is exemplified by the passage quoted from Dr. Elegido above, where he asserts that one major way in which positivist approaches in legal theory do great harm is “especially in so far as of themselves they tend to legitimate the actions of whoever finds himself in power.”⁶²

It takes only one moment for us to realise that if this allegation were true, it would be especially damaging to the credibility of the positivist theory in the African context. Most of the moral atrocities that people complain about were committed under undemocratic, dictatorial governments. In almost all the cases, those governments were military dictatorships; the regimes were often led by bands of military officers, who, after violently overthrowing a lawful government would proclaim the suspension of the legal basis of the democratic constitution, and subsequently proceed to govern by issuing decrees. The pertinent question is whether such military decrees qualify as valid laws.

The critic seems to suppose that the legal positivist would, willy-nilly, and without any further explanation or argument, return an affirmative answer to that question. Of course that supposition is wrong. It is in fact contradicted by overwhelming textual evidence from contemporary positivist writings. Since this crude conception of legal validity is an account which most modern legal positivists expressly reject, even if the account may, with some argument, be attributed to old-style reductionist legal positivism, it cannot be attributed to the positivist creed as a whole. Modern normative positivists in particular reject that gunman situation writ-large view of legal validity, along with other indefensible elements of Austinian positivism. According to H. L. A. Hart:

The root cause of the failure of [Austinian legal positivism] is that the elements out of which the theory was constructed, viz. The ideas of orders, obedience, habits, and threats, do not include, and cannot by their combination yield, the idea of a rule, without which we cannot hope to elucidate even the most elementary forms of laws.⁶³

I can see no basis for attributing to a theorist, who proposes that the concept of law be elucidated in terms of social rules, the simple imperativist model, according to which there may be nothing more to a regime of law than the gunman situation writ-large. In the same vein, I can see no justification at all for the critic's supposition that legal positivists would, without any further ado, accept the decrees issuing from the headquarters of a military junta as valid laws.

The critic might point out that Hart equivocates a lot on the concept of a social rule. As many commentators have pointed out, it is clear that by the time Hart developed his account of the existence of a legal system (as distinct from the validity of individual rules within a legal system), i.e., Hart's two minimum necessary and sufficient conditions for the existence of a legal system, the notion of social rules that goes into the analysis is radically different from the idea of customary social rules, introduced in the early chapters of *The Concept of Law*, which owe their existence to wide-spread acceptance in the relevant society. Given this equivocation, the critic might press on, Hart's normative legal positivism can offer no theory of legal validity that is qualitatively dif-

ferent from what is contained in John Austin's imperativist model.

This is no doubt a very strong objection against Hart's positivist theory of law. But, as I have argued elsewhere,⁶⁴ the objection does not hold against all Hartian positivist theories. In any case, my view is that legal positivists need to be more explicit in their explanation of the moral legitimacy of the foundation of a legal system. Observing that while Hart's minimum requirements may be necessary, they would not be sufficient to constitute the foundation of a legal system, I have proposed that: "In order for the enactment by officials to amount to valid laws (given that a valid rule of law has the inherent potential to generate the moral obligation to comply with its requirement) the process whereby persons get to become lawgivers and remain lawgivers, must be a morally legitimate one."⁶⁵

The critic's response might be to welcome this proposal, and then to gleefully proclaim that the underlying theory can no longer be a true variant of legal positivism. As usual, the critic would have been celebrating a bit too soon; his observation is wrong. While my proposal addresses the issue of the moral foundation of a legal system as a whole, it says nothing yet about the moral content of individual rules of law to be made by officials with the requisite moral authority, subsequent to the constitution of a morally legitimate legal system. On that latter question, I firmly uphold the *separability thesis*.

Going back then to the question we posed above: are the decrees issued by military regimes valid laws? My inclination is to return a negative answer. For how can anything lawful result from such fundamental illegality that military regimes often represent? But this answer would have to be further supported by arguments, for it clearly runs up against the received opinion on the matter. The received opinion is backed by much of existing international law, according to which the foundations of a legal system—the Kelsenian *grundnorm*—is deemed to be changeable by the incidence of a "revolution".

In the Cold War decades, during which time, coincidentally, military juntas were running amok all over Africa and in other parts of the developing world, public international law treated military coups d'état as satisfying the definition of *grundnorm*-changing "revolution". Therefore, the recognition accorded to successive military regimes in Nigeria and elsewhere in Africa, both by the municipal courts and the international community, was not necessitated by our legal systems' subscription to the positivist creed in legal theory; it was facilitated by the exigencies of international politics.

Other than this crucial distinction between the existence conditions of a legal system and the criteria of validity of individual rules of law, another important distinction which critics of legal positivism often fail to draw is that between the determination of the validity of a rule of law and the determination of its moral bindingness, i.e., determining whether or not a norm- subject lies under a moral obligation to comply with the provisions of the (valid) rule. Positivists are often treated as if they hold the view that the process of ascertaining the validity of a law is identical to the process of ascertaining whether or not there arises a moral obligation to obey it. But unless a positivist fails to pay attention to what he is doing, he cannot fall into that error.

Acutely aware of their endorsement of the separability thesis, modern positivists have often made it clear that the mere fact that a rule is legally valid does not, by any means, automatically translate to the generation of a moral obligation on the citizen to comply with it. Legal positivists know all too well that a law may be valid but too unjust or otherwise too immoral for there to be a moral obligation to obey it. Bentham's teaching is for a clear boundary to be drawn between "expository" jurisprudence and "censorial" jurisprudence. His admonition to the norm-subject is to obey promptly but to criticize freely. That Benthamite dichotomy still animates much of modern positivist writing, perhaps with the enlightened modification shifting the emphasis from prompt obedience to free censoring. Leading legal positivists are at the forefront of the enlightened liberalism of our age, just as Bentham and his disciples were the apostles of liberal reforms in their time.

The allegation was once made that the vulgarized reformulation of the separability thesis, "law is law" (*Gesetz als Gesetz*) may have served as the doctrinal shroud that blocked the moral vision of the courts in Nazi Germany. Professor Hart's response is that that attitude toward the law is not dictated by the logic of the positivist doctrine. Thus, next time someone comes around to recite that piece of platitude, "law is law", the correct response is to remind him that his platitude tells only half of the story: "the truly liberal answer to any sinister use of the slogan "law is law" or the distinction between law and morals is, "very well, but that does not conclude the question. Law is not morality; do not let it supplant morality."⁶⁶

Some critics would insist that even if legal positivism may not be directly implicated in the enthronement of a dictatorial regime, it nonetheless help such regimes to consolidate and to go about executing their immoral objectives with relative ease, using the instrumentality of the judiciary. Olufemi Taiwo, for example, alluded to ".how legal positivism might have made it easier for judges to escape censure for their roles under, say Idi Amin in Uganda or Ian Smith in Zimbabwe (then Rhodesia)."⁶⁷ Taiwo's further allusion to "unimaginative squirming judges [wanting] to hide under the veneer of having no control of their pronouncements", suggests that what he implies here is that a courageous, morally upright and resourceful judge operating under such a fascist regime should be able to ensure that his judicial decisions do not result in blatant injustice or undeserved human suffering. Taiwo seems to believe that a judge with these qualities would be able to frustrate the evil designs and programmes of tyrants like Idi Ami, Ian Smith, Sani Abacha, Mobutu Sese Seko, etc., to the extent that the tyrant attempts to accomplish his evil ends through the legal process (or what at the point in time passes as the legal process). The unstated assumption in Taiwo's argument and other versions of the objection by opponents of legal positivism, is that subscription to the positivist philosophy rubs a judge of the virtues of courage, moral uprightness, and resourcefulness.

It is of course difficult to see how this might be so; and Taiwo fails to provide any detailed explanation of the presumed process whereby the positivist philosophy turns judges—who are otherwise virtuous men and women—into moral cretins. In my view, subscription to the positivist doctrine should not in itself prevent a judge from attempting to rig the outcome of a judicial decision to suit his own moral convictions.

Legal positivism is not antithetical to judicial activism. Judicial activism is, however, a double-edged sword, it can cut both ways. Just as a judge whose morality we agree with might (under the banner of judicial activism) manipulate the interpretation of a legal provision, to obtain a morally agreeable result, so too might another judge, whose moral standards we disagree with, manipulate the interpretations of a rule to arrive at a morally disagreeable verdict.

Our experience in the recent past would indicate that the two kinds of judges are easy to find in the Nigerian judiciary. In the system where we had a high court judge with enough courage and moral rectitude to declare the so called Interim National Government (ING)—set up after the annulment of the June 1993 presidential elections—illegal, we also had another high court judge, who, under the cover of darkness at night, rendered the momentous verdict upholding the lawfulness of the so called Association for Better Nigeria's (ABN) prayer to have the presidential elections of June 12, 1993 stopped. I doubt whether Justice (Mrs.) Akinsanya, the judge at the Lagos high court was any less a legal positivist' or, positivist-inspired than Justice (Mrs.) Ikpeme, who gave the infamous ABN ruling at the Abuja high court.

In extreme cases, the professionally proper thing for a judge to do may be to resign his appointment, i.e., instead of returning a morally unjust verdict, or trying to tinker with the clear meanings of the law. The morally proper thing for any person to do is to join in the campaign against an evil regime. Depending on the severity of the atrocities being committed by the regime, and an overall estimate of the circumstance, such campaigns may range from peaceful civil protests to a resort to armed confrontation.

In the years immediately preceding the end of the Second World War, some suggestions were heard from certain scholarly circles to the effect that legal positivism may have contributed to paving the way for the enthronement and sustenance of the Nazi ideology in Germany – suggestions quite similar to the accusations now been leveled against the positivist creed by its African critics. Professor Hart's rejoinder to those allegations of possible positivist complicity in Nazis' reign of terror is most instructive. It is that rather than blaming the alleged "insensitiveness to the demands of morality and subservience to state power in a people like the Germans" on the positivist creed in legal theory, attempts should be made to discover the origins of such beliefs and dispositions in the German society. As Hart put it:

There is an extraordinary naivete in the view that insensitiveness to the demands of morality and subservience to state power in a people like the Germans should have arisen from the belief that law might be law though it failed to conform with the minimum requirement of morality. Rather this terrible history of insensitiveness to the demands of morality and subservience to state power prompts inquiry into why emphasis on the slogan "law is law", and the distinction between law and morals, acquired a sinister character in Germany, but elsewhere, as with the utilitarians themselves, went along with the most enlightened liberal attitudes.⁶⁸

Borrowing a leaf from Hart, I would admonish the African critics of legal positivism to commence inquiries into why democratic institutions and practices "have never been

permitted to germinate, not to talk of grow”, as Justice Aguda put it, in these African societies, instead of laying the responsibility for the social and moral evils of political dictatorship at the door step of the positivist theory.

An African Case For Legal Positivism

Philip Soper⁶⁹ has argued that the choice of a legal theory cannot be based on moral considerations. In other words, Soper is of the view that it would make no moral difference at all, whether one chooses legal positivism or its rival, the natural law theory. I doubt whether this is indeed the case, although I have no intention of defending a substantive position here. But even if one may not choose a legal theory for moral reasons, it would not follow that we may not prefer one legal theory to another, for reasons that are not any less compelling. Presently, I shall argue for the position that there are 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.

For our purposes here, we shall take the core element of a positivist conception of law as consisting in the affirmation of the separability thesis. On the other hand, we take the core element of a natural law theory to be the denial of the separability thesis. My contention is that faced with the choice between legal positivism on one hand and natural law theory on the other, there are strong historical and pragmatic reasons for the legal systems of modern nation states in Africa to choose the positivist doctrine.

Earlier on, in section IV.1 of the essay, I criticized Okafor’s characterisation of what he calls African traditional society on the grounds, *inter alia*, that the account fails to take due cognizance of the enormous cultural diversity that was the hallmark of the African continent, even in traditional times. 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.

It is a fact that many of the entities that pass for sovereign nation states in present day Africa are conglomerations of many different ethnic nationalities, who were arbitrarily lumped together by the colonial powers. The colonialists had magnified, or underplayed the differences between these ethno-national groups, as it suited colonial administrative convenience. Upon the departure of the colonial powers, leaders of the various ethno-national groups thus “united” for colonial administration had proclaimed the geographical areas covered by the territories of their different groups as independent sovereign states. But the elements of cultural diversity that characterized pre-colonial African societies have survived in the new nation states. The cultural differences are manifested in the various aspects of life, in different institutional structures and social practices, ranging from the most sacred—religious beliefs—to the most mundane, say, attitude toward commerce.

Nigeria, where many of these African critics of legal positivism and I come from, offers a particularly rich example of such a great diversity of ethno-national groups arbitrarily lumped together by the colonial rulers, and in which the constituent ethnic groups

have retained (indeed have been jealously guiding) their respective cultural identities, after the whole territory was declared an independent nation state in 1960.

There are close to three hundred natural languages in Nigeria – and that is not counting the many dialects of each. The majority of the population is unable to communicate in English, the language of the departed colonial power and the country's official language at present. Talking of religious creeds, Islam is the religion of the North, the Roman Catholic church is dominant in the East, Islam and Protestant Christianity co-exist in the West. There are, of course pockets of believers in various indigenous African religions in all the regions. Each of the major religious sects boasts of a dizzying array of sub-sects, ranging from extreme orthodoxy or fundamentalism to permissive liberalism, analogous, one might say, to the varied dialects of the natural languages. Added to these are a host of other cultural differences which, as I remarked above, are reflected in matters ranging from beliefs about matrimony and paternal obligations, to beliefs about the appropriate relationship between rulers and their subjects, to the morality of interest-charging. Nigeria, one can only conclude, is one spectacular geographical artefact.

Now consider the conception of law according to the critic's idea of what African jurisprudence should be. On that model of jurisprudence, which they claim to be in accord with the natural law doctrine, no positive enactment would be considered a valid law if it were in any way contrary to some assumed moral principle. We shall recall, for example, how Okafor had insisted that law, morality, and religion are to be held inseparable on the model of traditional African worldview, and how he had insisted that all efforts must be made by modern African legal systems to ensure that the laws faithfully reflect that worldview. If we adopt this natural-law-inspired constraint on the possible contents of positive laws, we would have to insert a provision in the Nigerian Constitution, to the effect that no law is to be deemed valid if it is contrary to moral, and perhaps also religious, standards. The question then would be, to which or whose moral or religious creed would the law have to conform? In other words, whose call is the lawmaker to heed, given the multitude of moral and religious voices presently co-existing within the Nigerian geo-political space?

In my view, the surest way to frustrate lawmaking, and consequently to court the perils of anarchy and the disintegration of the nation, is to impose this kind of constraints on the possible contents of our positive laws. Therefore, the separability thesis, according to which it would not be a necessary truth, hence not a necessary requirement, that our positive laws reproduce or satisfy certain moral or religious principles, will serve us better. Of course, our lawmakers would be encouraged to ensure that the laws they enact conform to as much of morality and, wherever possible, as much of religion, as possible.

Somewhere in his paper, Okafor had issued the warning that "African positive laws must not be confused with some past atrocious practices and acts occasioned by past ignorance of the course of nature and executed with great religious dexterity."⁷⁰ I consider this a most sensible admonition. It has a corollary: atrocities committed in the name of the law should not be blamed on religion or morality. Atrocities committed in the name of the law should be carefully investigated, to determine what "wrong beliefs"

motivated them, and to determine where precisely to put the blame.

Unfortunately, there can be no way to mark the distinction which Okafor here considers desirable, that is, if we follow him and his fellow natural law theorists in weaving the different institutions of law, morality, and religion into one tangled, inseparable (and of course inoperable) body of dogmas. On the other hand, one of the guiding aims of legal positivism, cashed out most forcefully in the separability thesis, is to enable us draw this kind of crucial distinctions. Standing firmly on the moral pedestal, we can keep a watchful eye on the operations of the positive law.

The objection could be raised that I have over-emphasized the issue of cultural diversity of the different ethnic nationalities that compose a typical nation state in post-colonial Africa; and that I underplayed the elements of cultural uniformity that are always on display in these societies. Is it not the case, as P.C. Nwukeze has observed, that “in the midst of the diversity of African cultures, there is striking cultural uniformity which allows us to talk of ‘African culture’”?²¹ In any case, as rational agents, do citizens of modern African states not agree on many important points of moral values? I suppose we can grant that both of these questions could be answered in the affirmative. However, I do not see how that would in any way undermine my conclusion that to impose the kind of moral or religious constraints on the possible contents of positive law, such as the critics of legal positivism advocate, would effectively paralyse the making and or the administration of laws in a country such as ours.

To grant that there are elements of cultural uniformity is not in any way to retreat from the observation that there are also elements of cultural diversity among the various ethno-national groups in modern African states. To concede that citizens of African states would agree on many important points of moral values is, likewise, compatible with the rival observation that those same citizens, informed by different religious and ethical beliefs, might disagree on many important points of moral and religious values. My contention is that where such areas of moral and religious differences are sufficiently fundamental, as I think they would be in any society as culturally diverse as a typical modern African nation state, they will frustrate efforts at making and administering laws, should there be moral or religious constraints on the possible contents of the law, such as the natural-law-inspired writers would propose.

It will not help much either, to say that the positive laws be required to conform only to the standards of critical morality. That suggestion presupposes that there is always agreement as to what these standards are. That presupposition is wrong. It is easy enough, I suppose, to expressly incorporate into the letters and principles of our positive laws, moral or religious values about which there is widespread agreement in the society.

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Endnotes

[1.](#) H.L.A. Hart, *The Concept of Law*, (Oxford: Clarendon Press, 1961). Pp. 204–205.

[2.](#) For more on this debate, see the following works; H.L.A. Hart, *The Concept of Law*, *ibid.*; H.L.A. Hart, “Positivism and the Separation of Law and Morals”, *Harvard Law Review*, vol. 71, no.4 (Feb. 1958). Pp.593–629; compare Lon L. Fuller’s rejoinder to Hart, “Positivism and Fidelity to Law – A Reply to Professor Hart”, in the same issue of *Harvard Law Review*, pp. 630–672; Joseph Raz, *The Authority of Law*, (Oxford: Clarendon Press, 1979), especially chapter 3; Neil MacCormick, H.L.A. Hart, (London, 1981); Neil MacCormick, “A Moralistic Case for a Moralistic Law”, *20 Valparaiso Law Review* (1986); Philip Soper, “Choosing a Legal Theory on Moral Grounds”, *Social Philosophy and Policy*, (1987); Deryck Beylveled and Roger Brownsword, “The Practical Differences Between Natural Law Theory and Legal Positivism”, *Oxford Journal of Legal Studies*, vol.5 (1985); pp. 1–32.

[3.](#) The African—mostly Nigerian—writers under reference here include the following. F.U. Okafor, “Legal Positivism and the African Legal Tradition”, *International Philosophical Quarterly*, vol. xxiv, no. 2, issue 94 (June 1984); pp.157–164; see also Okafor’s *Igbo Philosophy of Law*, (Enugu: Fourth Dimension Publishing Co. Ltd., 1992), especially the closing remarks entitled “A Challenge to Legal Positivism”; Rev. Dr. N.S.S. Iwe, “The Dangers of Legal Positivism to Our Indigenous Values and Remedy”, in T.O. Elias, S.N. Awabara, and C.O. Akpamgbo (eds.), *African Indigenous Law* (proceedings of workshop held between 7-9 August, 1974, at the University of Nigeria, Nsukka), published by the Institute of African Studies, University of Nigeria, Nsukka; pp.232–250; Aguda Akinola, *The Judicial Process and the Third Republic*, (Lagos: F&A Publishers Ltd., 1992), especially chapter 5; see also Justice Aguda’s two-part opinion page publications entitled “Back to Illegal ‘Laws’ 1”, in the *Guardian* newspaper of Monday, May 16, 1994, and “Back to Illegal ‘Laws’ 2”, in the *guardian* newspaper of Tuesday, may 17, 1994; Adetokunbo Okeaya-Inneh, “Why the Law Must Possess an Inner Morality”, in the *Guardian* newspaper of Wednesday, August 4, 1993; A.O. Obilade, “The Decline of Legal Positivism: A Critique of Two Tenets”, *The University of Ife Law Journal* (1986), vol. 1&2, pp.94–111; J.M. Elegido, *Jurisprudence*,

(Ibadan: Spectrum Law Publishing, 1994), see especially the authors introductory remarks on p. x.

[4.](#) In concrete historical terms, instances of this mode of adoption of a legal theory by a legal system are hard to find. It is conceivable that there was a period, in the 1920s and 1930s, when the Realist “predictivist” theory of law could be said to have been adopted in this sense, by the American legal system. This was the period when influential realists occupied strategic positions in and out the judiciary: from supreme court justices like Oliver Wendel Holmes jr., to deans and professors at leading American law schools. In this regard, no one can read Karl Llewelyn’s classic general introduction to law, *The Bramble Bush* (first published in 1930), and not be struck by the pervasive commitment to the predictivist conception of law. Llewelyn’s objective was to train lawyer - he was professor of law at Columbia – who would be good forecasters of the future course of judicial behaviour.

[5.](#) The concept of the rule of recognition was introduced by H.L.A. Hart. See *The Concept of Law*, chapter 6. The rule of recognition is the ultimate rule in a legal system, it specifies the criteria for the identification (recognition) of every other rule in the system. In other words, the rule of recognition contains the criteria of legal validity in a legal system.

[6.](#) In this respect, Professor Hart’s analysis of the positivist separability thesis, both in *The Concept of Law*, and in the Harvard Law Review article, cited above, is very instructive. I say more on this later in the text.

[7.](#) Virtually, all the Nigerian writers listed in note (3) above, make this claim.

[8.](#) Courses such as Commercial law, Land law, Tort, Criminal law, Law of evidence, e.t.c., that would make graduates of the law schools readily employable - by governments or in private chambers – thus furnishing them with a secure source of livelihood, enabling them, as Llewelyn used to put it, “to butter [their] bread, or to give them bread to butter”.

[9.](#) A.V. Dicey was quoted to have made this observation in an article in *Law, Mag. & Rev.*, vol.5 . The quotation is from John C. Gray, “Some Definitions & Questions in Jurisprudence”, *Harvard Law Review*, vol. Vi (1892/93), p.23. Happily, neither Gray nor Dicey seems to endorse this “practising barrister’s” opinion on jurisprudence.

[10.](#) Stromholm, Stig. *A Short History of Legal Thinking in the West*, (Stockholm, Sweden: Norstedts Forlag AB, 1985).

[11.](#) Austin, John. *The Province of Jurisprudence Determined*, edited with an introduction by H.L.A. Hart, (London: Weidenfeld and Nicolson, 3rd impression, 1968); lecture v, esp. p135ff.

[12.](#) *Ibid.* p.145.

[13.](#) *ibid.* Austin explains this at great length in lecture vi, pp.193 ff.

[14.](#) Ibid. pp. 13 – 14.

[15.](#) Ibid. p. 184.

[16.](#) A concise survey of the realist movement is offered by Brian Leiter, in his article, “Legal Realism”, in Dennis Patterson (ed.), *A Companion to Philosophy of Law and Legal Theory*, (Oxford: Clarendon Press, 1996); pp. 261 – 279.

[17.](#) Holmes, O. W. (jnr.). “The Path of the Law”, *Harvard Law Review*, vol. 10 (1897); pp.457 – 478.

[18.](#) Hart, H.L.A. *The Concept of Law*, op. Cit. Hart’s work has attracted a great deal of interest and critical comments. For a sympathetic exposition of Hart’s philosophy of law, see MacCormick, H.L.A. *Hart*, op.cit. Two collections of essays in honour of Hart are particularly useful: Joseph Raz and P.M.S. Hacker (eds.), *Law and Morality: Essays in Honour of H.L.A. Hart*, (Oxford: Clarendon Press, 1977); Ruth Gavison (ed.), *Issues in Contemporary Legal Philosophy: The Influence of H.L.A. Hart*, (Oxford: Clarendon Press, 1987).

[19.](#) Kelsen, Hans. *The Pure Theory of Law*, translated by Max Knight, (Berkeley & Los Angeles: University of California Press, 1967). For a major collection of critical essays on Kelsen’s work, see Stanley L. Paulson and Bonnie Litschewski Paulson (eds.), *Normativity and Norms: Critical Perspectives on Kelsenian Themes* (Oxford: Clarendon Press, 1998).

[20.](#) For more on this, see my “Normative Positivism and Its Modern Critics”, in *Legal Systems & Legal Science; Proceedings of the 17th World Congress of the International Association for Philosophy of Law and Social Philosophy (IVR) Bologna, June 16 – 21, 1995*; (ARSP – Beiheft 70: vol. Iv), edited by Marijan Pavcnick and Gianfrancesco Zanetti. Pp. 49 – 57.

[21.](#) Hart, H.L.A. *The Concept of Law*, op. Cit. P. 78.

[22.](#) Ibid. p. 95.

[23.](#) Ibid. pp. 181 – 182.

[24.](#) Hart, H.L.A. “Positivism and the Separation of Law and Morals”, *Harvard Law Review*, op. Cit. P.

[25.](#) Greenawalt, Kent. “Too Thin and Too Rich: Distinguishing Features of Legal Positivism”, in Robert P. George (ed.), *The Anatomy of Law: Essays on Legal Positivism*, (Oxford: Clarendon Press, 1996). Pp. 1–29, at p.19. I added the emphasis.

[26.](#) Paulson, Stanley L. “ Classical Legal Positivism at Nuremberg”, *Philosophy and Public Affairs*, vol. 4, no. 2 (Winter, 1975); p.134.

[27.](#) *ibid.* p. 136.

[28.](#) A notable exception is Elegido, *Jurisprudence*, op. Cit.

[29.](#) John Austin's classic, *The Province of Jurisprudence Determined*, was first published in 1832. Austin's widow, Sarah Austin published a second edition, with additional materials on the uses of the study of *Jurisprudence*, in 1861. Austin's statement of the positivist theory has since then been subjected to such intense critical scrutiny and attack prompting a modern American commentator to remark that Austin has been shot at so frequently for so long, that all that is left of his theory are holes, no substance. The reception of classical legal positivism has fluctuated from unreserved acclaim, to the most contemptuous rejection. For example, John C. Gray records that Austin's theory was "considerably in vogue" from about 1861 (when the book was reissued by Sarah Austin) to about 1874. In 1874 "Sir Henry Maine dealt it a severe blow in his last two lectures on the 'Early History of Institutions', since which time its credit has been sensibly shaken" (John C. Gray, "Some Definitions and Questions in *Jurisprudence*", *Harvard Law Review*, vol. Vi (1892/93), p.22.). The profile of Austinian positivism would thereafter rise and fall again. W.W. Buckland's observations seem to capture very aptly, the viscosity of the rising and declining fortunes of classical legal positivism, especially Austin's account of it: "The analysis of legal concepts is what jurisprudence meant for the students in the days of my youth. In fact it meant Austin. He was a religion; today he seems to be regarded as a disease." (W.W. Buckland, *Some Reflections on Jurisprudence*, (Cambridge, 1949), this passage was quoted by R.H.S. Tur, "What is Jurisprudence?", *The Philosophical Quarterly*, vol. 28, no iii (April 1978), p. 152). In what is generally regarded as the most comprehensive and careful survey of Austin's legal theory, professor Hart devoted the first three chapters of his own classic, *The Concept of Law*, to a detailed critique of Austin's ideas. His verdict after the painstaking study seems to have put the final nail on the coffin of reductivist positivism. The survey carried out in the last three chapters is, in Hart's words, "a record of failure." P.78. Hart is, nonetheless, persuaded that a more adequate account of the nature of law can be constructed from the ruins of Austin's theory.

[30.](#) Okafor, "Positivism and the African Legal Tradition", op.cit.p.157.

[31.](#) *ibid.*

[32.](#) *ibid.* p. 163.

[33.](#) Aguda, Akinola. *The Judicial Process and the Third Republic*, op. Cit. P.81.

[34.](#) Iwe, N.S.S. "The Dangers of Legal Positivism", op. Cit.p.233.

[35.](#) *ibid.* p. 236.

[36.](#) Okafor, F.U. op. Cit. P.

[37.](#) *ibid.* 161

[38.](#) *ibid.*

[39.](#) *ibid.*

[40.](#) *ibid.* 163.

[41.](#) *ibid.* 162

[42.](#) *ibid.* 163.

[43.](#) *ibid.*

[44.](#) *ibid.* 160.

[45.](#) *ibid.*

[46.](#) *ibid.*

[47.](#) *ibid.* 162.

[48.](#) *ibid.* 163.

[49.](#) *ibid.* 159.

[50.](#) Taiwo, Olufemi. “Legal Positivism and the African Legal Tradition: A Reply”, *op. Cit.* P. 200.

[51.](#) *ibid.* 198.

[52.](#) Elias, T.O. *The Nature of African Customary Law*, (Manchester: Manchester University Press, 1956); p. 287.

[53.](#) *ibid.* 286.

[54.](#) It is instructive that Bentham and his fellow utilitarians combined a strong endorsement of the positivist doctrine with highly enlightened liberal attitudes toward legal and other aspects of social reforms.

[55.](#) Bentham, Jeremy. *Theory of Legislation*, edited by Ogden, p. 317; quoted on p.286 of Elias.

[56.](#) *Ibid.* The emphasis is mine.

[57.](#) Elegido, J. M. *Jurisprudence*, p. x.

[58.](#) Okafor, F. U. “Legal Positivism and African Legal Tradition”, p. 164.

[59.](#) Taiwo, Olufemi. “ Legal Positivism and African Legal Tradition: A Reply”, p.199.

[60.](#) Aguda, Akinola. *The Judicial Process and the Third Republic*, pp. 82 – 83.

[61.](#) Ross, Alf. “ Validity and the Conflict Between Legal Positivism and Natural Law”, *Revista Juridica de Buenos Aires*, (1961), vol. 4, p. 56.

[62.](#) Elegido, J.M. see note (57) above.

[63.](#) Hart, H.L.A. *The Concept of Law*, p. 78.

[64.](#) See my “Normative Legal Positivism and Its Modern Critics”, note (20) above.

[65.](#) *Ibid.* p. 56.

[66.](#) Hart, H.L.A. “ Positivism and the Separation of Law and Morals”, p. 618.

[67.](#) Taiwo. Olufemi. “Legal Positivism and African Legal Tradition: A Reply”, p199.

[68.](#) Hart, H.L.A. “ Positivism and the Separation of Law and Morals”, p.618. It is encouraging to note that the kind of enquiries that Hart suggested are now being undertaken by serious scholars. The findings thus far confirm what the defenders of the positivist creed in legal theory have always insisted on. In an important recent study, Paulson has shown, convincingly, that not only did legal positivism not serve in any form to underwrite the atrocities committed by officials and private individuals in Nazi Germany, but that the German positivists were in fact among the most visible opponents of Nazism; an ideological stance for which the legal positivists were routinely victimized (Paulson, Stanley L. “Lon L. Fuller; Gustav Radbruch, and the ‘Positivist’ Theses”, *Law and Philosophy*, vol. 13, (1994). Pp. 313 – 359).

[69.](#) Soper, Philip. “Choosing a Legal Theory on Moral Grounds”, 44, *Social Philosophy and Policy*, vol. 4, issue 1, (1987); pp. 33 – 48.

[70.](#) Okafor, F. U. “ Legal Positivism and African Legal Tradition”, p. 164.

[71.](#) Nwakeze, P. C. “ A Critique of Olufemi Taiwo’s Criticism of Legal Positivism and African Legal Tradition”, *International Philosophical Quarterly*, vol.xxvii, no.1, issue 105, (March 1987); pp. 101 – 105.

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