

## **Theories of Law and Morality: Perspectives from Contemporary African Jurisprudence**

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*The relation between law and morality is a very important controversy in western jurisprudence. This paper examines the contribution of African legal theory by reflecting on six conceptual approaches. The paper argues that the thesis of conceptual complementarity between law and morality reflects, in a more convincing manner, the African position on the relationship between law and morality. The paper concludes that the thesis of conceptual complementarity constitutes a formidable challenge against legal positivists' view that law and morality are necessarily separated.<sup>1</sup>*

### **Introduction**

What is the nature of the relation between law and morality from the perspective of African jurisprudence? Given the nature of African socio-political formation, what picture can we draw on the nature of law and morality? How have African legal philosophers viewed the relation between law and morality? Is there any connection between law and morality going by the substance of African legal theory? What theoretical construct can African legal philosophy provide and formulate concerning the controversy of separability and inseparability in western jurisprudence? Is the controversy essentially a western construct without the possibility of any other cultural dimension added to it?

Venturing to provide answers to all these questions can be regarded as daunting for obvious reasons: in the first place, an understanding is required of what the nature of law as a normative concept, as naturalists would contend, or as a scientific fact, as positivists would argue. This much is replete in the age-long battle between positivists and naturalists. Secondly, the answers must, of necessity, take cognisance of the fact that even in western jurisprudence, the debate is unsettled and no satisfactory answers have yet been given. Robert Alexy's conclusion on this problem is not only timely but, also, of monumental importance and consequence. For Alexy,

The answer to this question has far reaching consequences. They cover nearly everything from the definition of the concept of law via the conception of the legal system to the theory of legal argumentation. It is, after all, a matter of the understanding of law and of the way legal science and juridical practice see themselves. This explains why no generally satisfactory answer has yet been found, although great pains have been taken to seek one (Alexy, 1989: 167)

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Thirdly, the dilemma is taken to its nth degree when an African philosopher ventures to take on the problem or, better still, when the African contribution to knowledge is weighed in the balance of Eurocentricism and the prejudice of social history. The reluctance on the part of the west in adopting and accepting Africa's contribution is pertinently portrayed in Olufemi Taiwo's castigation of western philosophy. According to Taiwo (1998),

All too often, when African scholars answer philosophy's questions, they are called upon to justify their claim to philosophical status. And when this status is grudgingly conferred, their theories are consigned to serving as appendices to the main discussions dominated by the perorations of the "Western Tradition.

It is evident in the literature that the prism through which Africa's contribution to knowledge and social history has been viewed has a historical locale. Africa's contribution to the substance of social history has been adjudged by Trevor-Roper in the famous 1962 Declaration as darkness. Incidentally, darkness, for him, is no subject of history even though, *ab initio*, darkness, formless and void, based on the authority of the scriptures<sup>2</sup> and scientific researches and discoveries<sup>3</sup>, were reported to be the state of the universe before it became what it is today. The challenge of African philosophy in general and African legal philosophy in particular is to transcend the limitations of Eurocentrism.

This paper will survey current theoretical approaches to understanding the nature of the relation between law and morality in African jurisprudence. Attention shall be placed on six theoretical approaches: the thesis of epiphenomenalism, the derivative thesis, the assimilationist thesis, the accommodationist thesis, the culturalist thesis and the thesis of conceptual complementarity. With each of these, the account of the relation between law and morality and the argument for and against each thesis will be discussed. The epiphenomenalist thesis posits that law is an offshoot or creation of morality. Accommodation theory states that law is institutionally related to morality inasmuch as, institutionally, there is a modicum of morality in every legal institution. The culturalist thesis claims that law and morality are both instances of a people's culture or way of life. The derivative thesis argues that law is derived from morality and that, to that end, morality is means by which law is regulated. The assimilationist thesis contends that law by its general character assumes some salient features of morality as a basic form of assessing its progress and impact on societies. The last approach, which is the conceptual complementary thesis, is of the view that law is incomplete without morality and morality is equally incomplete without law. From the above, a final verdict may be difficult to arrive at considering each of these theses but a clear indication may be made concerning the approach which is most convincing, or the approach which is most applicable to African jurisprudence.

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<sup>2</sup> The most plausible source of creationists and theologians proof that the universe emanated out of chaos and darkness is, of course, the Genesis story. However, many scientists happen to have lent credence to this view in the light of the arguments from theology. See, for examples, Robert Jastrow, "God and the Astronomer" (1978), Holmes Roston III "Shaken Atheism: A Look at the Fine-Tuned Universe" (1986), Donald Chittick, *The Controversy*, (1984) etc.

<sup>3</sup> Even though scientists have argued that creationism does not explain the origin of life and the universe, a very important assumption amongst their writings is the view that the universe evolved and emerged out of disorder or void. This much is replete in the arguments of scholars such as Victor Stenger "The Universe was Created by Accident" (1987), Isaac Asimov's "Do Scientists Believe in God?" (1979) etc.

### **The Thesis of Epiphenomenalism**

Legal epiphenomenalism states that law is a by-product of morality or the moral milieu in which it originates. Furthermore, it posits that law has its root and origin essentially in morality. It thus implies that the history of law is tied essentially to the history of morality. Morality thus explains how law came to be and its essence altogether. This means that if this epiphenomenalist thesis is accepted; it follows that law only makes sense only in the context of a moral framework.

From the above, one is inclined to regard Adewoye's (1987) conception of law and morality as an example of the thesis of epiphenomenalism. The importance of this conception lies in the fact that it explains generally the origin of law as sourced in the prevailing moral framework existent in a given society. Thus, the originality of this conception of the relation between law and morality consists in the fact that it pins down the relationship between law and morality in terms of the question of origin. The other side could equally be true: morality cannot be explained in terms of law since the by-product, i.e. *epi*, cannot, in any way, account for the phenomenon.

In the same vein, Idowu William wrote earlier in support of the epiphenomenalist thesis concerning the relation between law and morality in African legal philosophy. If the nature of African jurisprudence consists in the theory of reconciliation, it follows that the connection between law and morality within that context is epiphenomenalist in nature. The theory of reconciliation posits that law in African societies is not retributive in nature but essentially restorative in that it seeks to restore peace, harmony and existing relationship. It is not adversarial. In his words,

law and morality are blended and harmonised with each other such that the history of law is the history of society as well...it is in this sense that the relationship between law and morality in African jurisprudence is held to exhibit a kind of epiphenomenal character since both law and morality in this kind of society are mutually defining (2006: 14).

However, it seems this thesis is no longer defensible. The epiphenomenalist thesis renders law inactive, if not impotent, ascribing to morality a primary mode of existence more than law. Also, the epiphenomenalist thesis describes the relation between law and morality not in terms of symmetry but in a one-way, causal sense in which the *epi*, in this case law, has nothing to impact causally/generically on the phenomenon. In a way, logical or empirical necessity is denied in the law-morality relationship advocated by epiphenomenalism since logical necessity, for instance, requires that the predicate of a necessary statement be contained in the subject or the other way round. Our analysis must then go beyond the epiphenomenalist thesis since epiphenomenalism does not explain nor capture the salience of a necessary connection between law and morality in African socio-political thought or, better still, does not answer the positivists' stance on the Separability thesis.

### **The Thesis of Accommodationism**

The accommodationist thesis is also a favourite conceptual position in African jurisprudence on the relationship between law and morality. The accommodationist thesis states that law is an institutional accommodation of morality. Institutional accommodation can be defined as an imposition of limit on the scope of shared sameness between what is legal and what is moral. While there is an attraction of law towards the moral merit of a case, there is always an imposition of limit on the extent to which the law can be varied to meet the demands of justice. In all probability, it can be reasoned that Gluckman's model is more in tune or can be branded the accommodationist model. According to Gluckman,

The push and pull of Barotse jurisprudence consist in the task of achieving justice while maintaining the general principles of law. This is clearly demonstrated in the fact that while at some time, the judges are compelled to go against their view of the moral merits of cases in order to meet the demand for certainty of law, on the other hand they try to vary the law to meet those moral merits (1963: 198).

One of the early treatments of the nature of African law was offered by Max Gluckman. Gluckman's sufficient grasp of the African attitude to the idea of law and its conformity with the issue of justice, amongst the Barotse of Northern Rhodesia, no doubt, is commendable. In the first place, law among the Barotse is sourced in customs, judicial precedents, legislation, equity, the laws of natural morality and of nations, and good morals and public policy. Another source is what Gluckman (1967: 231) calls "natural necessities", the laws or regularities operating in the environment and in human beings and criminals.

A careful reading of Gluckman on the nature of Barotse jurisprudence shows that morality is foundational to the nature of law. This is what Gluckman (1967:231) calls "the laws of natural morality and of nations, and good morals and public policy." Natural morality could thus be interpreted to mean principles or ideals of morality. Again, it could be interpreted to mean principles of natural rightness or wrongness, on the assumption, one could guess, that morality is a natural property inherent in man, an instinctual kind of impulse which creates feelings of acceptance or rejection of what is either good or bad. An interrogation of Barotse jurisprudence shows a clear instance of a legal and philosophical system which is built around ideals of morality and justice.

To this end, accommodationism posits that law is only an acceptance of moral values which are necessary to its fulfilment, vitality and most importantly, to its social and general acceptability. In other words, the accommodationist model draws boundaries between what is essential to law and what is essential to morality. Thus, the whole of morality is never at stake when considering its relation to law. This thesis draws some inspiration from the submission of H. L. A. Hart on the legalisation of morality. According to Hart,

It does not follow that everything to which the moral vetoes of accepted morality attach is of equal importance to society; nor is there the slightest reason for thinking of morality as a seamless web: one which will fall to pieces carrying society with it, unless all its emphatic vetoes are enforced by law. (1979: 249)

The problem with accommodationism is that it denies that law has a foundational inspiration from moral values. In other words, a practical assessment of the history of the relationship between law and morality, in specific cultures, will show the falsity in the assumption and claims of accommodationism. From a keen sense of history, morality has been found connected to the development of law such that law is not simply an institutional accommodation of morality but, in these cultures, such as the ancient Greek world, and even in Barotse, Igbo and Yoruba cultures, law appears to be founded on the platitudes of morality, thus giving it its inherently normative and evaluative character. According to Okafor (1992: 90), “the Igbo positive laws, together with their legislative and judicial methods ...are inseparably bound with their religion and morality stand as a challenge to legal positivism.” Thus, from a religious and moralistic point of view, law is not just an accommodation of morality but the view that the basis of law in Igbo jurisprudence is tied around religion and morality. Okafor (1984: 163) submits that:

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

Thus, it emerges that that the thesis of accommodationism, with respect to the relation of law and morality, is in need of revision. The Separability thesis as advanced by legal positivists is likely to remain unaffected by the thesis of accommodationism. Legal positivists are not denying the historical connection between law and morality. They do not even deny the importance of morality in evaluating law. They are known for denying that a law ceases to be a law if it is immoral and that a moral rule translates, effectively, into a law just because it is morally desirable. Furthermore, what they deny is the view that law and morality are necessarily dependent on each other. If this true of the positivists' claim, it follows that the thesis of accommodationism may not be regarded as having successfully debunked the positivists claim by the fact that there exists a limit in the relationship between law and morality. If we look at Gluckman's example, accommodationism suffers a further flaw, if indeed it sees morality as not involved in the certainty of law. Gluckman (1963: 189) wrote of the Barotse example that “judges are compelled to go against their view of the moral merits of cases in order to meet the demand for certainty of law.” How is the certainty of law to be defined? Clearly not in a unidirectional manner, since law is not built and founded on law alone. The definition of the certainty of law is multidimensional: one is the moral while another that readily comes to mind is the procedural. This view is in accord with the controversial but factually plausible or reasonable observation of Lon Fuller (1964: 162) that law is not and cannot be built on law alone. If this reasoning is clear, then it becomes a proposition to be accepted that accommodationism is mistaken by excluding morality in the certainty of law.

### **The Thesis of Culturalism**

The thesis of culturalism on the law-morality relationship, a conceptual possibility in African jurisprudence, is based on the nature of cultures in each society. Law and morality are both cultural

phenomena existing and found in all cultures and in most societies. From a cultural point of view, law and morality are part of the growth and development of the culture of a people. What, then, is culture?

Webster's Third New International Dictionary (1982) defines culture in more than one sense. In an intellectual sense, culture is said to be the "act of developing by education, discipline, social experience; the training or refining of the moral and intellectual faculties." In an anthropological sense, culture refers to the "total pattern of human behaviour and its products embodied in thought, speech, action and artefacts, and dependent upon man's capacity for learning and transmitting knowledge to succeeding generations through the use of tools, language and systems of abstract thought." From these definitions, it is clear that a people's culture embraces a lot of things abstract and real, actual and potential, sometimes perceivable or coded in sets of principles for living.

Edward Tylor (1871), the great classical anthropologist, defined culture as all the items in the general life of a people. The highest social value of a given culture is its unity, a holistic construct through which their beliefs and hopes about and experiences of life can be interpreted and understood. A people's culture, therefore, concerns the formation, development and manifestation of the creative essence of man as pictured in that given society. This is often achieved through the regulation of mutual relations of man with nature, society and other peoples.

Fleischacker (1994: 71) defines culture as, "a set of practices and beliefs that persists over several generations." If culture is simply taken to mean people's way of life, in terms of what they believe and practice, one way by which these practices and beliefs are often known is by the kind of laws that permeate that culture. In the same vein, practices of a given society are also known by the kind of moral values which underlie those practices or which gives meaning to them in the first instance. What it translates to mean is that law and morality are expressions of a people's way of life. Thus, from that conception of culture, one can infer that the way of life of a given people is what manifests in their laws and in the moral values they hold. The culture of a given people is what is expressed in their law. In the same way, their culture is what is expressed in the kind of moral values espoused in that society. On both levels of analysis and understanding, cultural affinity therefore ties and connects law and morality together.

This behoves us to conclude that the relationship between law and morality is expressible in the fact that both are expressions of the ways of life of a people. A people's way of life is not divided but a single whole. It is often expressible through their thought patterns. Significantly, also, a people's culture refers to the ontological or metaphysical worldview which often gives meaning to the practices and beliefs which encapsulates their culture. The relationship between law and morality, from the cultural perspective, shows that what is legal and what is moral originate directly from the ontological framework which is prevalent within that culture.

One possible problem that this conception of the relation between law and morality will have to resolve borders on the notion of cultural change or shift. Cultural change or shift may be occasioned by many factors. For example, cultural change may occur when prevailing practices and beliefs are dysfunctional to the progress of the societies concerned. Furthermore, cultural change could occur when existing practices and beliefs are discordant with the ethos of a new set of cultural values that a new

generation is bent on implementing. Moreover, cultural change could result from the inevitable facts that existing practices and beliefs are not cohering with other parts of the whole tradition of a people. What is more, such changes may be on account of a shift in metaphysical worldview, which may be as a result of an imposing, impervious and undaunted religious experience. This list could be endless. Such cultural change may sometimes be maximal, minimal or average.

The question is: what then would the nature of law and morality be in the case of such cultural changes? For example, colonialism in the world and particularly in Africa represents a very huge cultural imposition on the colonised. It not only affected but equally transformed the cultural worldview of the colonised societies. In burial matters, dress codes, etiquettes, styles and in religious practices nowadays the influence of colonialism has been very strong. In the proper African setting, greetings are done by the younger to elderly ones through the act of genuflection or prostrating. It is characteristic of western culture to shake hands with those who are older than one. Attitudes towards extended family members have also changed. Thus, quite a number of behavioural changes have been noticed amongst Africans due to the influence of colonialism and, in recent times, the growing impact of globalisation all over the world. Through the possibilities offered by the internet, attitudinal and behavioural patterns have been greatly influenced. The reverberating effects of globalisation, no doubt, have been and are been felt in the area of jurisprudence of nations-states. What was accepted as part of the cultural jurisprudence of a particular nations-state are being challenged by national citizens who have the opportunity of appraising what is going on in other places all over the world.

All these kinds of experiences represent a form of cultural change in Africa such that laws, morals, religion, values etc. were suppressed and super-imposed on by the cultural patterns, interest and desires of the colonial masters. For example, during the days of colonialism, African customary laws were regarded as veritable aspects of paganism. Today, most of those laws have either been replaced or, where they are still found, are completely in abeyance. The modern courts system patterned from the legacy of colonialism are the machineries for dispensing justice. A justice system patterned after traditional life style and cultural practices are moribund.

Starr and Collier (1989: 3) are of the view that law, for example, is a thing constructed by human agency encoding certain power relations. Law represents a mindset. Colonial laws, for instance, represented the ideology imprinted in British jurisprudence. The state in every political society also represents a specific ideology. The character of laws enacted by the state is a picture of the kind of legal ideas and ideology that prevails in that community. Evidently, law entails an exercise of power relations since it shows the nature and scope of the locus of power between the citizenry and those who govern.

Thus, when colonialism was imported into Africa, what it brought was a projection and display of western supremacy. That supremacy was enforced especially through the agency of law. It is in this sense that Richard Roberts and Kristin Mann (1991:11) contend that “the new faith of Europeans in the moral and material superiority of their own civilisation convinced them that exporting their culture would be good for Africans.” In the same view, Hopkins (1980: 776) reiterated that “Europeans equated standard of morality with standard of living, and they found both wanting in Africa.”

Granted this postulate, colonialism represented or encoded a kind of power relations between the powerless or subjugated colonised people and the powerful or subjugating colonialists, at least as far as colonial relations were concerned. It is in all probability true that colonialism changed the face of African law. Colonialism was established through force and conquest. As emphasised by Murungi (2004: 521),

Colonial jurisprudence in Africa...was largely the jurisprudence of subjugation. Violence was an essential feature of this jurisprudence. In the eyes of Africans, colonial law was a concrete manifestation of this violence. It was a coercive power in its raw sense. Jurisprudence was the justification or validation of this violence. It was the gunman situation writ large...

Again, Roberts and Mann's observation concerning the effect of colonialism on African law is instructive. In their observation,

When Europeans conquered Africa they encountered populations with well established indigenous and Islamic systems of law. Conquest did not destroy these systems, although it often subordinated them to metropolitan legal traditions and changed their relationship to political authority and productive relation (1991: 8).

If this is the case, it follows that colonialism has not only changed the face of law in the colony but also changed the relationship between law and morality, if we go by this cultural perspective on the relation between law and morality.

In fact, when there are cultural changes in a given society, it is often the case that only one part of a society's culture is exposed to change. For example, the legal power structure could change without a resulting change in the moral structure. In this case, the influence of the imposing culture would create a bifurcation in the legal structure, especially between the indigenous culture and the imposing culture. Since these two structures are 'co-existing', it is difficult to comprehend the relationship between law and morality. Whose morality? Which law? In the existence of two structures, the foreign and the indigenous, what meaningful relationship can be built in the process?

A different situation can be established when the cultural change in question is not of an imposition but one of adaptation of an alien culture. This adaptation occurs through assimilation and the process of ready acceptance. In this kind of situation, time is required in which the process of internalisation of the values of the alien culture are adapted. Still, in this kind of social situation, the nature of the relation between law and morality assumes another character entirely.

Aside from the above, another problem for this conception is the provision of a convincing distinction between, on one hand, law and morality as part of a people's culture and, on the other hand, law and morality as part of the tradition of a people. Is culture necessarily the same as tradition? If not, what is the distinction? Or, if it is, what connects them? Which is more enduring – culture or tradition? Based on this, can we say law and morality are just part of culture and not tradition or part of tradition and not culture? Or is a culture necessarily reflected in a tradition or vice versa? What could then be the implication of the

culture-tradition distinction on the relation between law and morality in African jurisprudence, viewed from the culturalists' perspective?

As argued by Kwame Gyekye (1997: 217-218), even though it is sometimes difficult to distinguish between culture and tradition, there is an essential distinction. This distinction is very important in the consideration of the tradition-modernity binary often peddled in characterising African situations and societies and the western, advanced world in general. What then is tradition? What is meant by culture? What is the difference and how does that difference enhance our understanding of law and morality from a cultural perspective?

According to Lord Acton (1952: 2), tradition is "a belief or practice transmitted from one generation to another and accepted as authoritative, or deferred to, without argument." In the words of Edward Shils (1981: 12), tradition means "anything which is transmitted or handed down from the past to the present." A somewhat different conception is offered by Samuel Flesichacker (1994: 45) who states that tradition is "a set of customs passed down over the generations, and a set of beliefs and values endorsing those customs." If we accept the definitions of culture offered so far, we are compelled to concur with Gyekye (1997: 218-212) that there is an obvious difference between culture and tradition. According to Gyekye, the distinction is highlighted by the fact that people create cultural values but it is not every cultural value created that ends up in the annals of tradition. The difference is that cultural items require time to be transformed into a tradition in every society.

Given this argument, it follows that both culture and tradition are socially inherited practices and beliefs that profoundly affect our lives, though in the hierarchy of meaning and social priority, a tradition is deeper in meaning than culture. In this case, it shows that if law and morality are regarded as part of culture, it is not impossible that what is culturally true of the relationship between law and morality may not be ascribed the status of tradition. This demonstrates their changeability and modifiability. Such modifiability or changeability may be directed just at the nature of law in such society without an effect on morals, for instance, or vice versa. The inability, however, to handle the distinction between culture and tradition weakens the culturalists' thesis on the relationship between law and morality in general and, particularly, in African jurisprudence.

### **The Derivative Thesis**

Looking through the jurisprudential canons of specific societies in Africa, the derivative thesis takes off from the assumption that the content of law is derivative of certain principles of morality. For example, while explaining the nature of Barotse jurisprudence, Max Gluckman (1963: 198) contended that legal concepts are imbued with ethical imperatives. This indicates that law derives its obligatory status depending on the content of such laws. As explained earlier under the accommodationist thesis, if we follow Gluckman's portrayal of Barotse jurisprudence, the contents of a law, that is, what a law stipulates, is judged meaningful insofar as those contents are sensitive to moral principles and ideas. Okafor's interpretation is pragmatic. For him, "laws in the Igbo traditional setting must conform to the ethics and morality of the people" (1992: 90).

Nkiruka's (2006: 17-36) idea of *ubuntu* and the character of obligation to obey the law seems to endorse the derivative thesis in relation to the connection between law and morality in African legal philosophy. *Ubuntu* is a Zulu word, often adapted from the Zulu proverb *umuntu ngumuntu ngabantu*. As defined by the South African Government of 1996, it means:

The principle of caring for each other's well being...and a spirit of mutual support...Each individual's humanity is ideally expressed through his or her relationship with others and theirs in turn through a recognition of the individual's humanity. *Ubuntu* means that people are people through other people. It also acknowledges both the rights and responsibilities of every citizen in promoting individual and societal well-being (1996: 16)

*Ubuntu* is thus a communalistic ethic. For Nkiruka, this communalistic ethic defines the nature of law and also the character of obligation in African socio-political structures. In an astute parody of the limitation of the Cartesian cogito in relation to African social setting, Nkiruka, in agreement with scholars such as Menkiti (1979: 171-173), Wiredu (1996: 19) and Mbiti (1969: 108), sees the communalistic ethic in terms of what the individual is to the rest, a communalistic ethic rendered not as 'I am because I think' but as 'I am because we are' (2006: 21). *Ubuntu*, therefore, explains obligation as the moral relationship between the person, the individual and the community.

The character of obligation is thus derivative. Obligation to obey the law derives from the morality of the law. Interestingly, Gluckman (1963, 1967, 1992), Adewoye (1977, 1987) and Okafor (1984, 1992, 2006) indicate that, among the Barotse, Yoruba and Igbo cultures, apart from the claim that law and morality are inseparable, i.e. not conceptually separable, laws in general derive their originality and enforceability from their own content. Apart from Adewoye's espousal of the thesis of epiphenomenalism, Yoruba jurisprudence, for him, endorses the derivative thesis as well. This is the view that law derives necessarily from morality. According to him,

Law in the traditional Yoruba society cannot be divorced from the moral milieu in which it operated...law in the Yoruba society *derives* its attributes from this moral milieu. It is this milieu which also endows law with an authority sufficient to dispense with the mechanics of enforcement (1987: 3) (emphasis mine)

The excellence of the derivative thesis is, however, dampened by the fact that it only affirms a kind of asymmetrical relationship between law and morality. Law is to be derived from moral principles, but what morality derives from law is left unanswered. In a nutshell, it can be argued that the derivative thesis does not capture the essence of the relationship between law and morality. The derivative thesis contends that law is derived primarily from morality and not vice versa. There appears to be historical validity in this assertion; historically, law is derivative of morality. One important implication of this thesis is the view that law is therefore external to morality just as it is true that morality is also external to law.

### **The Thesis of Assimilation**

The thesis of assimilationism is of the contention that law is an assimilation or incorporation of the features and qualities of morality. Since law assimilates morality, it is pointless to argue whether law and morality are related. The assimilationist thesis, as we understand it, posits that the issue of relation between both concepts is assumed once it is true that law and morality assimilate or incorporate each other or at best that law is an assimilation of morality. Okafor's (1984) model can be interpreted in the light of assimilationism in the sense that, for Okafor, law is an assimilation of the features inherent in a given society's ontology which is, for Okafor, a moral foundation. Thus, when law is said to exist, just as long as it incorporates the ontology of a people, what is stressed and at what is at stake is the view that law is an assimilation of what is ontologically good, which is the morals of a people. Thus, "what is considered ontologically good will therefore be accounted," according to Okafor, "as ethically good; and at length be assessed as juridically just" (1984:163). Our tentative understanding of assimilationism with respect to the connection between law and morality is plagued by one obvious point, a fundamental area of difference between law and morality. Truly, law may incorporate or assimilate the ideals of morality. Moreover, it is equally possible for law to be regarded as overlapping with the nature of morality. But the thesis cannot go farther than the opinion that law assimilates morality. The assimilationist thesis may be stranded on the issue of difference if it can be argued, for instance, that both concepts possess different semantic or linguistic structures.

It is often observed that, going by the structure of language, the language of morality and that of law represent two different fulcrums though both specifically eliciting an aspect of human behaviour. Nowell-Smith (1954: 190-198) argued that the language of morals involves the demand for reasons for the performance of the expected duty whereas the language of law, both in the advanced and crude forms, is silent on the search for reasons but openly canvasses for compliance based on the authority backing it. The authority behind law is that of command or force, not rational authority.

### **The Thesis of Conceptual Complementarism**

The starting point of this theory is that an adequate picture of a legal system, in empirically observable terms, reflects more of a conceptual complementary nature between law and morality rather than one of conceptual separability. The thesis takes off from the view that law and morality, if seen from the perspective of conceptual complementariness, cannot be conceived in separable terms. The basis is captured in Riddall's statement when he contended that

So closely may law and morality be intertwined that in some societies the two may be regarded as not forming separate notions. In the societies of the western world, however, the two spheres have generally been seen, notwithstanding the numerous interrelationships, as concepts that are distinct (1991: 295).

In the light of the above, it is suggested that while the Separability thesis as advocated by legal positivists may not be an entirely false system, it is not always the case with every legal system. It could be argued that the thesis is not an attractive theory in the canons of African jurisprudence. With respect to

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the canons of African jurisprudence, it is contended that the relation between law and morality is a conceptual complementary relation. The complimentary relationship between law and morality is dialectical in the sense that the view that both may not be logically dependent on each other is made stale and redundant by the fact that neither is complete without the other, despite the claim of conceptual dissimilarity. Even if it is agreed, that, in ostensible terms, law is different from morality, and morality is different from morality, it still does not follow that to be different suggests being separable. To accept the thesis of separation on this ground is to deny the complementarity of both concepts.

In very clearly stated terms, conceptual complementarity does not deny that both law and morality, conceptually, are different; what is denied is the view that since they are different, then, it is also the case that they are separate or separable. Two or more concepts may be found different or dissimilar. But the fact of dissimilarity between these concepts does not necessarily connote separation, especially when both are complementary. The complementarity does not remove the dissimilarity but may entail inseparability.

The definition of difference, as conceptual complementarity sees it, is only an opportunity for an extensive definition of morality in terms of law and vice versa. This extensive definition of both concepts in terms of each other in the framework of conceptual complementarity consists in the fact that both concepts are necessary accompaniment of each other in a legal system. In other words, one is incomplete in a legal system without the other. It is in this sense that it is suggested that law taken separately makes a legal system or system of philosophy of law incomplete and as such that a system of laws or legal system is necessarily built on moral standards and also essentially revolves around moral standards. This necessity, in terms of complementarity, is what is implied when it is said that one is an extension of meaning and intelligibility of the other. A conceptually complementary relationship cannot be defined in terms of the notion of Separability. This kind of conceptual complementarity deflects from possible existing positions in African jurisprudence as earlier stated and argued.

By endorsing an accommodationist thesis in regard to the relation between law and morality what is denied by Gluckman (1963, 1967) is the conceptual complementary relationship between law and morality. What the thesis of conceptual complementarity thus ascribes to the relation between law and morality is the view that law derives its certainty by its foundational moral status. How that certainty or general principle of law is inclusive of morality, is what is endorsed when it is said that law and morality express a kind of conceptual complementary relationship.

To ask whether there were any sort of necessary connection between law and morality, or perhaps, if there is any such thing as the inseparability thesis in African legal theory, showing the connection between them, the answer is likely to be that law is the enforcement of morality *in fact* and morality is the enforcement of law *in conscience*. Moreover, this kind of conceptual complementarity between law and morality in the African milieu seems to have received some support considering the metaphysical worldview shared by Africans, especially when we consider, for instance, the Yoruba culture which will be discussed later. In the general sense, an exploration of the metaphysics of a people is a way of demonstrating what is intelligible to them. This metaphysics not only establishes the basis of intelligibility

for them, it also helps us in understanding their theory of meaning, the framework of meaning and the whole structure of thought on which certain basic elements of their life are explainable in general.

This metaphysics cuts across and explains their basic thoughts and beliefs with respect to human nature, human action, human hope and beliefs etc. Often, it is no wonder if this kind of metaphysical outlook and structure are classified as the people's methodologies or ways of knowing (epistemology). It serves as a way of understanding their philosophy. In this kind of outlook it is not a misnomer to state that what is philosophical for them is also methodological. That is why Sodipo, for instance, contended that within this kind of structure and metaphysical outlook,

philosophy is reflective and critical thinking about the concepts and principles we use to organise our experience in law, in morals, in religion, in social and political life, in history, in psychology and in the natural sciences. (Sodipo, 1973: 3)

To a large extent this existing pattern of thought and belief system is radically influenced and shaped by the prevalent metaphysical outlook or framework it bears. The preponderant and prevalent metaphysical outlook and framework in which basic relations, ideas about life, ideas about the afterlife, about human actions, experiences of life in society whether past or present are judged and encoded in a meaningful structure consist in what can be regarded as African traditional thought. In this kind of metaphysical thought system, law is held to be meaningless without the restriction of morality while morality is also expressed in one way or the other through the instrumentality of law. Law bears out the moral life and convictions of the society. The legal is not odious to the moral and the moral explains the legal. To divorce the moral from the legal is like separating the snail from its shell. The moral foundation of an average African society seems to be the carrier of its laws, in which case it shows the depth of connectedness between the legal and the moral.

Trenchantly, there is a metaphysics that underlies, for example, the Yoruba people's experiences and conception of law and morality. In Yoruba culture, for instance, the metaphysical framework through which public life and activity, even aspiration, is judged is called *iwa*. In the Yoruba lexicon, there have been many debates in the interpretation and right translation of what is meant by the word *iwa*. Ordinarily, *iwa* means character or behaviour. But that line of interpretation is awkward since it distorts what is essentially authoritative and meaningful about that word. Some have shown that *iwa* actually means good character while others still, have argued that *iwa* means the wellspring of a moral status, wellbeing and personality. Disregarding the controversy, in Yoruba culture, what is actually projected through the concept of *iwa* is the salience and significance of the moral history of the people's culture in whatever is done in the society. To this end, public life and activity are regulated by that ruling principle and policy. It is in this sense that law, for instance, as a measure of public life, must conform to that moral history ingrained in the people's culture. In other words, it means law, for instance, must reflect, speak and incorporate *iwa*. This principle, *iwa*, simply stated, constitutes a basis for assessing law. Law, also, is a carrier and enforcement of *iwa* as a public demand. All these are encoded in Yoruba metaphysics.

This metaphysics also undergirds their several attempts at understanding their history, religion and social and political life in general. In explaining their schema for intelligibility, it is to this metaphysics that the Yoruba

people look. There is a wall of separation between the explanation for every day life and the inherent metaphysics which serves as their structure. In a way, this cultural metaphysics serves as the structure on which the totality of life and its varied dimensions – the legal, moral, political, social etc. – constitute the superstructure. To this end, it can be postulated that this superstructure is part of the intricate constituents and composition of the cultural metaphysical conception of history endorsed by the Yoruba people. Indeed, the salience of interrogating the Yoruba metaphysical paradigm in understanding the ideological pretensions and controversy, in legal philosophy, over the Separability thesis becomes, a fortiori, of crucial and utmost significance.

Two factors account for this significance: Firstly, when philosophy was to investigate and interrogate the nature, essence and origin of the universe, it was from metaphysics that it sought help. In fact, philosophical inquiry was the inquiry of metaphysics. It is in this sense that Bentham considered metaphysics, rooted in experience and reflection, to be the root of all knowledge. In his words,

metaphysics is descended of credible parents, Experience and Reflection. The precise date of her birth, she never could recollect... Nursing mother if not parent of the whole train of sciences, yet disowned by thy children (Bentham, 1945: 16).

Secondly, the whole field of jurisprudence or legal philosophy seems parasitic to metaphysics in its dependency. It has no separate problems except those conferred on it by metaphysics, for instance. This is echoed in the observation of Ronald Dworkin. According to Dworkin (1977: 1),

The philosophy of law studies philosophical problems raised by the existence and practice of law. It therefore has no central core of philosophical problems distinct to itself, as other branches of philosophy do, but overlaps most of these other branches...the debate about the nature of law, which has dominated legal philosophy for some decades, is, at bottom, a debate within the philosophy of language and metaphysics.

Given this, the conceptual complementary character of the relation between law and morality in African legal theory derives from the language of the concept of law itself. This linguistic or semantic economy appears to be a derivative of the prevailing metaphysical worldview alluded to earlier. It appears that the certainty of the concept of law includes the moral relevance of that law. How that certainty or general principle of law is inclusive of morality is what is endorsed when it is said that law and morality express a kind of conceptual complementary relation arising from the idea of law and terms or concepts used in demonstrating it.

For example, when the words used to describe or conceive law in most African political societies are examined critically, such words tend to be implicative of morality too. For example, among the Barotse of Northern Rhodesia as stated by Gluckman (1963), the word *nulao* is used to express the idea of law. But then, among them, it is significant to know that the word *nulao* expresses the idea of other regulatory mechanisms among the Barotse such as morality, laws of nature and even what the Barotse refer to as the laws of God.

In the same vein, juristic thoughts, as argued by Adewoye (1987), among the Yoruba people can be discerned in their use of proverbs. There are proverbs among the Yoruba people that are of jurisprudential value particularly on the subject of law and morality. For example, among the Yoruba people it is often said that “*ilu ti ko si ofin, ese ko si nibe*”, meaning that in a society where there is no law, sin cannot be imputed.

The importance of this proverb cannot be overemphasized. *Ofin* here means law in the literal, ordinary sense. *Ese* means sin or transgression. From this proverb, it is suggested that breaking the *ofin* makes one a sinner or transgressor i.e. *elése* one who transgresses. Yet in ordinary English usage, the idea of law-breaking is not often conflated with the notion of sin. In other words, law-breaking is not often ascribed a moral status. But that is what the Yoruba linguistic economy has succeeded in doing. The breaking of law is defined in a moral, evaluative sense rather than a purely legal sense.

The deduction is that the foundation of human interaction with the law, given the validity and truth of this Yoruba linguistic economy, is removed from the realm of the legal and placed within the realm of the moral. This distinction therefore becomes of utmost significance in that it establishes the inseparability of the legal and the moral in Yoruba philosophy. In most cases, in general jurisprudence, breaking the law is not always seen from the moral perspective. If it is so, then it removes the understanding of law away from the purely legal perspective as most legal positivists have consistently argued it to be. For example, to have broken the law in English and American jurisprudence does not warrant the appellation of a sinner. ‘Sinning’ is a religious, moral concept with a distinct metaphysical coloration quite removed from jurisprudential parlance. But then, what is implied in that adage is the conflation of the legal and the moral going by the meaning of words in Yoruba philosophy.

One rebuttal of this argument suggests that the import of the proverb has more of a Christian religious undertone than a legal or jurisprudential import. Even if we are to accept that line of reasoning, the fact remains that Yoruba people have a notion of sin just as they have of right and wrong. And the placing of this perspective for them is important not only in the religious realm but also in the jurisprudential realm as well.

This is the reason why the Yoruba jurisprudential framework collapses the distinction often held between what is social, ethical, legal or simply political. This conflation is, perhaps, informed by the view that law and morality are conceptually complementary. The basic rationale behind the closing of the gap between these areas of human life consists in the view that no area of human life is left to chance. Legal and moral categories encode a necessary relationship, not contingent. The principles underlying this jurisprudential framework are often sometimes rigid.

The summary of the arguments consist in the proposition that African jurisprudence subscribes to an inseparable relation between law and morality in the sense that law and morality are viewed in a conceptually complementary relation. This conceptual complementary relationship derives, first, in the conceptual metaphysical worldview existent within the relevant system and, secondly, is also corroborated in the linguistic economy that is operational within that system.

An acceptance of the thesis of conceptual complementarism may end up being a strong challenger for the Separability thesis propounded by legal positivists. Some of the issues bordering on the

Separability thesis *a propos* the thesis of conceptual complementarity can be considered in their minute details and it may be discovered that there might be the need for revision, perhaps, on the Separability thesis and its other dimensions.

For example, an evaluation of Austin's (1966:77-98) Separability thesis in the light of the conceptual complementarity of law and morality will require some amount of modification. If law and morality are indeed complementary, it will be pointless to argue that the demerit or merit of law is separate from its existence. It is worth reiterating that if a concept is complementary to another concept, though both are different, it does not necessarily follow that they are separable.

A complementary relationship establishes that both concepts are necessary to each other. This necessity is defined not in terms of similarity but in terms of complementarity. Two concepts need not be similar before we can establish inseparability. Such a case of inseparability can be demonstrated once it is the case that both concepts are complementary. Thus, what we argue for is a case of conceptual complementarity between law and morality, and not conceptual Separability. In most African societies such as the Barotse and Yoruba cultures, law and morality are embroiled in a kind of complementary relationship.

A more probing analysis of the Separability thesis in the light of the features of African jurisprudence can be undertaken. It is contended that underlying every attempt at separating law from morality by prominent legal positivists is the deliberate exchange of speculation with legitimate reality. Beneath this exchange, however, is a denial of the complementarity of law and morality in every legal system.

There are possible objections to this conceptual understanding of the relationship between law and morality in African jurisprudence. About the most notorious objection to this thesis is that the same may not hold true to western jurisprudence. If it does not, what then will be its contribution to general jurisprudence?

Nothing is impaired for general jurisprudence if it is held that the path and status of African jurisprudence necessarily intersects with the paths of jurisprudence in other cultures and other traditions. Even if the thesis adumbrated here were to hold for western jurisprudence, it is nevertheless a truism that the premises may not be the same since there is always an assumption of distinctness in every cultural report about aspects of human existence and human social activities. Besides, granted also that this thesis could hold in western jurisprudence, it still does not follow that this status of African jurisprudence is or can be denied relevance in general jurisprudence. There will always be nuances that make for distinction.

## **Conclusion**

From the hordes of theories on the relation between law and morality in African philosophy of law, it is not too preposterous to contend that there are still many issues to unearth and to explore in African cultural worldview. While it may be true that reflections on ideas in African law have been essentially slow and recent, it, however, does not presuppose that those ideas never existed until the encounter with the west through colonialism. Each society grounds its existence and its continuity in the fact that certain

ideas are isolated and classified as internal to the relevant history of such societies. They form part of their consciousness and constitute, in the process, its basic ideology for understanding life. Both conceptual and practical in nature, this basic ideology are the means by which the resilience of the people are entrenched and, in turn, defined.

It is from this African world view that ideas about theories of the relation between law and morality have been taken. While it is true that colonialism has a lot of influence on the template of African law, it is not true that African law never existed before colonialism. As alluded to earlier, Roberts and Mann (1991:8) affirmed that the commencement of colonialism brought with it aspects of British jurisprudence but it met an existing pool of laws governing the community of the colonised. What British and colonial jurisprudence did was to suppress existing African laws. Even eminent British jurists commented on the existence of a sophisticated system of laws in British West Africa at the commencement of British colonialism. According to Sir James Marshall (1887:180-182),

My own experience of the West coast of Africa is that Government has for the time succeeded best with natives, which has treated them with consideration for their native laws, habits and custom, instead of ordering all these to be suppressed as nonsense, and insisting on the wondering Negro at once submitting to British constitution, and adopting our ideas of life and civilisation...what I wish to say is that the natives of the Gold Coast and the West Coast of Africa have a system of laws and customs which it will be better to guide, modify and amend rather than destroy by ordinance and force.

Corroborating the testimony of Sir James Marshall's observation about the existence of laws in African communities before colonialism, *The Times* of July 17, 1886 reported as follows:

Sir James Marshall's suggestion as a recent conference at the Exhibition ...is one well worthy of consideration. His testimony as to the efficiency with which the natives administer their own laws as very striking. He has sat beside native judges, and witnessed with admiration their administration of Justice. These people have their own laws and custom, which are better adapted to their condition than the complicated system of English jurisprudence.

While it is true that colonial jurisprudence brought in its wake a complicated legal system, complicity is relative and, in most cases, is not the basis for assessing the existence of a theoretical expression of law and other normative dimension of human society such as morality. The theories discussed here are, however, not exhaustive. This does not, however, impinge on their relevance and significance to modern debate in African jurisprudence in particular and, jurisprudence, as a whole body of juristic thought.

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