

## SCEPTICISM, RACISM AND AFRICAN JURISPRUDENCE

### Questioning the problematique of relevance

by William Idowu

*ABSTRACT.* Any serious scholarship on the place of law in African realities must necessarily raise questions about prevailing concepts and theoretical approaches. This is as a result of the fact that the architectural furnishings of jurisprudential and legal researches have been by and large distilled from Europe and American experiences. The questions, however, are why is Africa's complex historical and cultural experience not fully represented in the current corpus of canonical works? Why is there so little, if any, respect for and, as a consequence, interest in African phenomena and their philosophical resonance? Why is it that there is an intellectual numbness and muteness about all that is African? In what ways are the historical and cultural heritage of Africa reproduced, projected and represented in contemporary philosophical disquisition? Looking across the broad panorama of philosophical and legal traditions, there have been series of responses in relation to the 'unrepresentative' nature of the import and substance of African theory of law in general jurisprudence. It argues that beneath the absence of an Afrocentric approach in mainstream, general jurisprudence is the view that mainstream jurisprudence subscribes to a Eurocentric historiography defined essentially in skeptical and racial terms. It examines the views of two prominent philosophers David Hume and Hegel on Africa, contending, as it were, that their views are not in consonance with the temperament of philosophy in general and the central features of their thought.

*KEY WORDS:* jurisprudence, racism, scepticism, social history, philosophy, Africa

*The only way in which a human being can make some approach to knowing the whole of a subject is by hearing what can be said about it by persons of every variety of opinion and studying all modes in which it can be looked at by every character of mind. No wise man ever acquired his wisdom in any mode but this. – John Stuart Mill*

### *Introduction*

Every position has its opposition. Every thesis has its anti-thesis. Every ar-

gument or claim has its counter claim. The depth of truth in all these claims is the view that variety is the spice of life. This variety is reflected in the cultural and material treasures which all cultures and varying societies in the world have to contribute to making the whole of human life worth understanding. It is in this sense that one understands the philosophical import of Mill's conclusion about the need to consider opposing viewpoints not only to determine but also to have the balance of the truth. The beauty of Mill's position, therefore, is not only paramount but also profound. The movement of its importance and lessons for social life and existence far outweighs and outshines the motion, speed and movement of light. It touches most significantly on the virtue of tolerance in social life. In fact, a cardinal point hinted at in John Stuart Mill's opinion is the view that no experience emerging from anywhere is irrelevant in forming our general theory about society and social life.

Significantly, therefore, the only way in which concrete progress can be measured and evaluated in the field of knowledge production – in the arts, humanities, in science, in jurisprudence – consists in the understanding of what every age, culture, society and civilisation has to say with respect to these items of human advancement and hope. It is therefore no misnomer if it is contended that the only way in which humans can make advancement in the area of knowledge production is by making efforts to understand what every culture has to say concerning that area of knowledge production.

However, as good as this idea may seem to be, the fundamental problem of all times is how to ensure that all of human experiences across all ages, civilisation, culture, epoch are made productive for the liberal understanding of a specific fact of knowledge. One specific fact of human knowledge and existence is the idea, theory and notion of law i.e. jurisprudence. Law is one of the greatest institutions and social practices ever developed by man. It represents a major step in cultural evolution. It also presents, in its totality, man's (in the generic sense) experience in the light of his contact with the world within and without. In the light of this philosophy of experience, it is a basic hypothesis that without a comprehensive grasp of all experiences, law can be presented only in an artificial and contradictory way.

Jurisprudence, in general, is concerned with the theory or idea of law. Historically, there have been and there still are different orientations and worldviews in the attempt to understand the nature of law and its function in

every relevant society. This is premised on the fact that men have not always held the same view about law and its overall place in societies. Men's perceptions about the law, and the different orientations that have grown out of these perceptions cannot be extricated from their overall philosophy and experiences. In fact, all kinds of experiences are of relevance and their importance arises from the knowledge they provide for understanding every aspect and sphere of human society. This applies, very crucially, to the idea of law. It is no wonder then that Justice Oliver Wendell Holmes Junior retorted that

“the actual life of the law has not been logic, it has been experience” (1938: 1).

In the same vein, Karl Friedrich once asserted that:

“Only by taking account of all the different kinds of experience can we give an image of the law adequate to reality and at the same time general. Only then can a comprehensive jurisprudence (emphasis mine) be developed” (1963: 7).

However, unlike some other jurisprudence that is and can be labelled as primarily reactive in nature, African jurisprudence is not reactive. It is not reactive in the sense in which feminist jurisprudence, for instance, can be tagged as reactive in the sense of a revolt against the habit of obedience in societies which treat the female gender and issues of central concern to them as a microcosm of both the well-ordered state and pious congregation with the male standing in for civil authority and divine sanctions. Rather than being reactive, African jurisprudence is engrossed in the requirement or quest for relevance. This quest can be likened to the idea of a restless ghost seeking to unload the burden of memory from a troubled past. It is the restlessness of this quest that animates the present endeavour.

There are three persistent questions in the quest for the nature and substance of African Jurisprudence. These questions form the core of the quest for relevance of African jurisprudence in mainstream jurisprudence. These are the questions to be discussed in this paper. To this end, the structure of the paper shall take upon a thorough discussion of each of these questions that form the core of the historical quest for the relevance of African jurisprudence. The questions are:

1. Is there an African Jurisprudence?
2. What is the substance of African jurisprudence?

3. Why is African jurisprudence not represented in the body of jurisprudential thoughts and reflections?

*Is There an African Jurisprudence?*

The question whether there exists an African jurisprudence is not new. What is new however is the contemporary responses to the age old question. Interestingly, it has a counterpart. Its counterpart in this quest for significance and relevance is the controversy over whether there exists an African philosophy. For over three decades now, scintillating debates over the existence of African philosophy have engaged the attention of scholarship all over Africa, Europe and the Americas.

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

Even though the memory of the story teller, Africans writing and telling their own history, may be a worrisome burden but then it is believed that this burden only has its explanation in the view that the requirements of history is always awesome. It is in the awesomeness of the requirements of this history that African jurisprudence seeks to locate the quest for relevance.

In my view, four glaring positions are discernible in the responses to the question whether there exists an African jurisprudence. Evidently, these varying positions have their corresponding justifications. In the first place, there are those who claim that there is nothing like African jurisprudence. The second position states that there may be but no one is sure what it consists of. The third position states that African jurisprudence is not too different from mainstream jurisprudence while the fourth response posits that there is an African jurisprudence with its distinctive attributes and substance.

In this paper, I subscribe to this last position but then a quick review of these varying positions is necessary.

In the first place, there are proponents of the view that there exists no African jurisprudence. It was J.F. Holleman (1974: 12) who wrote in a very provocative work that there is nothing like an African Jurisprudence. The great denial in Holleman's work is the view that Africans lack a conceptual and vividly correct analysis of the concept of law. Significantly, the import of this argument has been pushed further in the view that even if Africans had indigenous systems of social control, it lacked substantially, any trace of legality, legal concepts and legal elements. This is also pertinently reflected in the view of J.G. Driberg (1934: 237-238) that

“generally speaking, symbols of legal authority [i.e. police and prisons] ...are completely absent, and in the circumstances would be otiose.”

The attack on the idea of African jurisprudence has been reduced to the idea that African rules of societal control and norms could not be distinguished from rules of polite behaviour. The basis for this assertion and the denial of African jurisprudence, perceptively, can be explained in the light of three reasons: one, the absence of a legislative system, with the existence of a formal courts system and legal officials; two, due to the absence of a recognised system of sanctions; and thirdly, the presence on a large scale of authoritarianism which is not subject and controlled by law. Interestingly, the import of these attacks consists in the view that African Jurisprudence is at best queasy.

On our part, we argue that the attempts to down play the reality of African systems in general and African Jurisprudence in particular has a peculiar history. This history, according to our reasoning, is enmeshed in the projection of Eurocentric superiority. This shall be attempted in the third section. But then it is sufficient to state, as a conceptual and intellectual response, that regardless of how primitive a society may be seen to be, it is human and logical to expect that the survival of this kind of society is an ample pointer to the existence of some form of enlightened thinking on the part of its members. According to Bewaji,

“When we make a critical examination of the diversity of human beliefs in various parts of the world, it seems clear that even the simplest-looking belief system must be

acknowledged to have developed from some form of critical examination of events, things, beliefs, etc. Without such philosophical presuppositions and, indeed, expostulations, on the part of members of these societies, it is difficult to see how such cultures and societies could have survived” (2002).

Again, in a more philosophical approach, Elias debunked the view denying the existence of African Jurisprudence. Connoting abstract linguistic correspondence, Elias retorted that

“it would be difficult for Africans to have continued to enjoy the progress they have even in the face of civilisation if they could not think and feel about the interests which actuate them, the institutions by means of which they organise collective action, and structure of the group into which they re organised.”

Secondly, there are those who contend that there is something reminiscent of law that can be labelled African Jurisprudence but the problem is that one cannot be sure of what the substance is or what it consist of. In this tradition, the view is held strongly that at best what Africans refer to as their jurisprudence or legal concepts are ingrained in customs, very crude and starkly naked in terms of reflective importance. For example, M’Baye (1975) states that

“the rules governing social behaviour in traditional African societies are the very negation of law.”

In the same vein, M. G. Smith (1965) postulated that

“African peoples only know of customs instead of law.”

In fact, Hartland (1924: 5-6) rendered this point in ethnocentrically unmistakable terms when he opined that “primitive laws is in truth the totality of the customs of the tribe. Scarcely anything elides its grasp. The savage lives more in public than we do; any deviation from the ordinary mode of conduct is noted, and is visited with the reprobation of one’s fellows.” However, our argument consists in the view that to be ignorant of a fact or an entity does not deny that fact or entity from its actual existence. Anchoring one’s argument on this kind of reasoning will be to be guilty of one of the incredible instances or the *ignorantiam fallacy*.

The third position on African Jurisprudence consist of scholars who are of the view that African Jurisprudence is not too different from mainstream

Western Jurisprudence hence the question on whether there exists an African Jurisprudence appears unnecessary and a mere superfluity of naughtiness and nothingness. The grand objective of this third position has always been to interpret and apply the nuances of schools of thought in mainstream jurisprudence in the light of the African legal tradition. It is in this sense that one can suggest that the debate in the eighties between Okafor, Taiwo and Nwakeze what these authors have succeeded in doing in their write-ups consist in the attempt to legitimise and justify our view that African legal tradition is simply non-antagonistic to western jurisprudential tradition and as such not remarkably different.

The fourth position is that of scholars who contend that African Jurisprudence embody and incarnate a very substantial aspect of African life, and for that matter, not only exists but also displays and manifests a basic reality that is unique and materially authentic. This position is replete and reflected in the works of scholars such as Max Gluckman, T. O. Elias, P. Bohannan and A. Allot. Their arguments on the existence and reality of African Jurisprudence consist in an indirect form of attack on the denials of African jurisprudence. Elias (1956: 6), for instance, posits that except for the differences in social and cultural environment, laws knows no differences in race or tribe as it exists primarily for the settlement of disputes, and, the maintenance of peace and order in all societies.

In corroboration of this position, Max Gluckman (1972: 173) wrote that the denial of African conception and system of laws is a great mistake stemming from a tradition imbued with enough ignorance about how the law works and thinks among Africans. In his words,

“Africans always had some idea of natural justice, and a rule of law that bound their kings, even if they had not developed these indigenous conceptions in abstract terms.”

Making an improvement on what was echoed in Gluckman’s views, Elias, in a very provocative style, provided a convincing platform on which the abstract purity of African Jurisprudence can be best understood. According to Elias (1956: 33)

“the two chief functions of law in any human society are the preservation of personal freedom and the protection of private property. African law, just as much as for instance English law, does aim at achieving both these desirable ends.”

Whether what is regarded as African Jurisprudence really exist and of intellectual significance can only be treated quite soundly and answered quite correctly when we ponder on the nature and content of African traditional institutions from which their conception and reasoning on the nature of law can be deciphered.

*What is the Content of African Jurisprudence?*

It is often clear that an accurate trace of the history of jurisprudence has been consciously westernised with a rejection of the realities of African conception of law. In modern and universal discussions of law, there is a wholesale rejection of African legal philosophy. This issue has received varied and confusing replies. But then what is the substance of African Jurisprudence?

It may help to identify the following as meanings and contents of African jurisprudence as bandied about by African scholars in contemporary, reflective thinking on the African philosophy of society.

- The contention that laws are instrument of conciliation, compromise and reconciliation;
- The contention that laws are codes of general principles, not of details, for the general guidance of society;
- The contention that the study and understanding of laws and the idea of legal personality in the African milieu transcends the realm of the individual but speaks of group responsibility;
- The communitarian theory of law which expresses the idea that law is a reflection of the communal spirit and bond;
- The contention that laws are recognised operative normative system embodied in unwritten but widely accepted usages and practices in forms of covenants and customs; and
- The contention that there is a thin line of demarcation between law, as a recognised normative system and other recognised normative systems such as morality, religion and culture etc.

Each of these atomic contentions of African jurisprudence shall be explained

in detail.

In the first instance, African jurisprudence encapsulates the proposition that laws are instruments of conciliation, compromise and reconciliation. A unique phenomenon of African life that is of fundamental and immense value is the idea of conciliation and reconciliation. The ideals of conciliation and reconciliation have been discovered to be an integral part of African life, culture and tradition. These ideals have always had their significance in African social, legal, ethical and corporate life.

In fact, the socio-ethical framework in which lives in the African socio-political economy is operated, measured and assessed altogether consists in the search for a form of conciliation and reconciliation. In very drastic nuances, compromise is the ideal of social relations especially when interactions between communities have broken down. It is the ideals of conciliation, reconciliation and compromise that spell clearly the agenda of peace in any intra or inter communal clashes.

These ideals constitute the bedrock of conditions that paves way for the progress of the communities concerned. It is these ideals that Yoruba people have in mind when they often sing that *shemi nbi o ni ogun ore laye* meaning that the bond and therapy of friendship in this world is that of reconciliation after conflict. This aspect of African life and law is echoed pertinently by Abraham when he opined that reconciliation

“is lacking in Western penology (where) the offender is punished without making restitution. On emerging from prison he is reconciled neither to himself, his victim nor to society (1975: 187)”

The beauty of this theory of law can be seen in the fact that law is not principally an instrument of coercion but an instrument of conciliation. This contradicts the adversarial notion of law in the west in which what matters is the search for either the adversary or the winner.

Writing on the philosophical significance of this feature of general African jurisprudence as demonstrated in the judicial process among the Barotse of Northern Rhodesia, Max Gluckman enthused that

“When a case came to be argued before the judges, they conceive their task to be not only detecting who was in the wrong and who in the right, but also the readjustment of the generally disturbed social relationships, so that these might be saved and persist. They had to give a judgement on the matter in dispute, but they had also, if pos-

sible, to reconcile the parties, while maintaining the general principles of law” (1964: 28).

No other aspect of African jurisprudence and philosophy of society has received cutting and unrestrained criticism as this aspect of African jurisprudence: African law as the quest for the restoration of social equilibrium. Propounded by Driberg, the attack states that, in the light of the quest for social equilibrium, African jurisprudence can be seen only as a positive instrument alone but not a negative one. What this means is the view that African idea of law was not directed towards the punishing of offenders; rather, it is a concern for how people should behave.

As such, law was only used to restore the pre-existing balance in a social set-up. In whatever way this objection is cast, it is still a truism that African law not only exists but can be said to compare favourably with western notion of justice. In fact, according to Roberts,

“That there is a recognised code of law founded on principles of justice is apparent if we examine the native laws affecting murder, adultery, theft and many others...as into the laws governing inheritance, ownership of children, property or mortgage we find much resemblance to those in force in European countries” (1956: 36).

Again, the heart of African jurisprudence can be deciphered in the view that laws are codes of general principles, not of details for the general guidance of society. According to Lambert, this ideal of African jurisprudence is best exemplified in the legal and judicial practices of the Kikuyu tribe in Kenya. In the words of Lambert,

“The widely held view that Africans have not yet evolved a code of law requires some qualification. Every tribe has a code, but it is a code of general principles, not of detail. Every judgement must conform to it, though the principles are applied with a latitude unknown to European law” (1956: 118).

Incorporating the ideal of the African philosophy of society, of which the jurisprudential framework is aptly represented is the view that the understanding of laws and the idea of legal personality in the African milieu transcends the realm of the individual but speaks of group responsibility. In the African context, the main goal of traditional institutions is the maintenance of law and order. But what is of curious interests is the recourse to the responsibility of the entire community in the maintenance of these legal codes

and norms. As argued and enunciated by Echekwube,

“the understanding is rife that the consequences of sin extend beyond the individual offender to his family and eventually to the whole of the community” (2002: 29).

Succinctly, the African philosophy of society is lacking in a purely individualistic cosmology.

And what is more, the African legal tradition is a clear expression of the communitarian theory of law that expresses the idea that law is a reflection of the communal spirit and bond. What do we mean by the communitarian theory of law? The communitarian theory of law inherent in African jurisprudence has been the subject of pertinent attacks and controversy. The attacks not only centre on what is projected as group theory of law but also its implications for any theory of law for that matter.

Some scholars often say that this aspect of African legal tradition beclouds our real judgement of the nature of law. Driberg, for instance, claims that African law is founded on a collectivist organisation (1934: 231). In other words,

“collective responsibility is ... a potent factor in the prevention of crime and in the liquidation of an offence without extraneous pressure (p.238).”

This critique is brought home forcefully in the contention of M’Baye that African theory of law offers only an opportunity

“to live under the protection of the community of men and spirits” (1975: 138)

that there are no individual rights, since the individual has no role to play in legal relations (p. 143).

Even though there is a modicum of truth in this assertion, however, it beclouds the sense of meaning attached to this aspect of African law since it is not the total truth. For one thing, it is true that a purely individualistic agenda is somewhat unpopular in African society, but then it behoves one to state that the group theory does not completely whittle away the power or the weakness of the individual in the whole gamut of legal and social relations in African society. Juristic thoughts among the Yoruba people, for instance, points to the idea of individual responsibility.

In Yoruba juristic thought and philosophy, it is often echoed that *Ika ti o*

*se ni oba nge* meaning that the finger that offends is that which the king cuts. “Individualism”, as argued by Omoniyi Adewoye,

“certainly has a place in Yoruba juristic thought...but the direct fastening of responsibility to individuals in criminal matters, implied in these sayings, does not detract from the collective sense of shame which a criminal’s family would feel. The criminal is punished as an individual, but the reputation of the family would have been tarnished” (1987: 7).

Moreover, to accept the claim that the role of the individual is questionable in African law will mean a rejection of the presence and acceptance of what is called ‘sage’ philosophy amongst certain African philosophers, foremost Oruka.<sup>1</sup> Sage philosophy is not a communal thing, it is purely an individual thing. The practice and potency of sage philosophy points to the importance that the individual commands in African life.

What the group theory of law as evinced in African law states is the view that individualism is not held as a strict ideology that overrides communal interests. Every individual has rights under every dispensation in African philosophy of society, but the beauty of this view of society consist in the fact that rights are and can be surrendered in the pursuit of communal rights and interests. This is reminiscent of the debate between libertarians and communitarians in Western social and political philosophy.

Besides, the group theory should not be held in a negative light for African law. The group is a phenomenon that depends on the level of social development of the clan or tribe. The more the clan develops, expands and interacts with other groups, the less the group cohesion. In fact, according to Elias, the idea of development seems to brighten the group theory since it is obvious that when we have a society or community, we have little of group identity (1985: 85).

In the final analysis, African jurisprudence reflects the proposition that laws are recognised operative normative system embodied in unwritten but widely accepted usages and practices in forms of covenants and customs. The general character of African law as embodied in customs and practices of the people has become the object of pertinent criticisms. But in it bears

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<sup>1</sup> Oruka, H.Odera, 1990, ed., *Sage philosophy: Indigenous thinkers and modern debate on African philosophy*, Leiden: Brill.

some of the striking qualities and features of the African mind. Customs bears out the nature of ontology that is not only reminiscent of the past but also a qualifying ego of the African future. Besides, it incorporates the moral ideals that are relevant in any meaningful discussion of the legal tradition in Africa.

The very idea of customs in relation to the discovery and grounding of knowledge seem to have received a devastating blow in the works of David Hume. The Humean notion of custom is

“everything which proceeds from a past repetition without any new reasoning or conclusion; it operates before we have time for reflection, and is a ‘secret operation’ ” (1978: 104).

However, laws as reflected in customs are never secret operations but critical aspects of what people are found to do and what they accept as binding on them. It is in this sense that Alan Watson argues that

“The nature of custom is quite unlike that of any other source of law. Other kinds of law making are, at least in form, imposed on the populace from above; custom represents ... what people do [and accept] as having the effect of law” (1984: 1).

The customary nature of African law is thus a fundamental aspect of African ontology. Arguable, at least from the ontological point of view, is the fact that there is always a thin line of demarcation between the realm of the legal and the realm of the moral in African philosophy of society. Whereas positivism and its jurisprudence holds as separable the relation between law and morality, African jurisprudence not only sees both law and morality as inseparable but also posits that laws have a moral framework which makes them inseparable one from the other.

In Yoruba philosophy of law, for instance, laws bear a moral dimension that makes it inseparable. Placed within a theistic metaphysics, Yoruba Jurisprudence posts the view that law is an epiphenomenon of morality. It is along this line of thought that Adewoye posits that

“law in the traditional Yoruba society cannot be divorced from the moral milieu in which it operated...law in the Yoruba society derives its attributes from this moral milieu. It is this milieu which also endows law with an authority sufficient to dispense with the mechanics of enforcement.”

In fact, as argued by Okafor, only a law with an ontological foundation would be a law of the people for the people (1984: 163). The ontological foundation of African law is discernible in its moral foundation. In his penetrating conclusions, Okafor submits that

“The province of African jurisprudence is thus large enough to include divine laws, positive laws, customary laws, [ etc.] (...), 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” (1984: 163).

*Why is African Jurisprudence not Represented in the Body of Thoughts on Jurisprudence?*

The difficulty of representing and picturing African legal tradition in its various philosophical, cultural and anthropological expressions is emphatically not a new enterprise in African philosophy and African studies. That the African philosophy project, of which African jurisprudence hopes to build its claims, is a success can be consented to entirely without any modicum of doubt. But then, any serious scholarship on the place of law in African realities must of necessity raise questions about prevailing concepts and theoretical approaches. This is as a result of the fact that the architectural furnishings of jurisprudential and legal researches have been by and large distilled from Europe and American experiences.

The questions, however, are why is Africa’s complex historical and cultural experience not fully represented in the current corpus of canonical works? Why is there so little, if any, respect for and, as a consequence, interest in African phenomena and their philosophical resonance? Why is it that there is an intellectual numbness and muteness about all that is African? In what ways are the historical and cultural heritage of Africa reproduced, projected and represented in contemporary philosophical disquisition?

Looking across the broad panorama of philosophical and legal traditions, there have been series of responses in relation to the ‘unrepresentative’ nature of the import and substance of African theory of law in general jurisprudence. Our concern here is with a critical analysis of some of the perceived notions about the salience of African jurisprudence. In a simple

sentence, our contention is the view that there is a display of scepticism with respect to the knowledge of the idea and concepts of the law that completely deflects from the idea of scepticism about law and its nature often manifested in mainstream jurisprudence. This brand of scepticism can be branded racial scepticism. It is this kind of racial prejudice and Eurocentric scepticism with respect to the African understanding and postulations or conceptions on the notion, functions, idea, scope and the limits of law that this paper promises to probe into. In specific terms, the paper identifies this racial scepticism to be represented in the thoughts of leading figures such as G.W.F Hegel and David Hume in the history of Western philosophy. It is the racism in their thoughts and their tantalising effects on the representation of African realities that we shall set out in the remainder of this paper.

There are at least three sets of factors that are generally adduced in any meaningful, scholarly work, as having contributed to the unrepresentative nature of African legal theory in general jurisprudence and legal scholarship. The first derives from the alleged question or fact of ignorance about the ability of the African to ratiocinate and thus engage in conceptualising the notions of law or even any subject of intellectual endeavour for that matter. The second stems from what is often regarded as the absence of any written work of intellectual worth. The third stems from what can be regarded as the resilient paradigm of cultural, anthropological prejudice about African realities of life.

While not contending that these reasons are irrefutable, our view is that a rebuttal to each of the arguments beggars the belief that general, mainstream jurisprudence represents and depicts a bend towards a Eurocentric historiography which tends to define the past in the light of its history. In this light, it is thought necessary to have a critical look at the presuppositions on which each of these views are based in order to establish where they do not really capture the heart of the matter.

About the best capture of the heart of the first two factors hinted at above is that proffered by T. O. Elias and A. A. Allot. For both scholars, African legal theory appears underrepresented in the body of works and thoughts in general jurisprudence arising from ignorance in the first instance and the problem of written records. Essentially, there seems to be a connection. According to Allot, for instance, silence about African law stems from the opinion of ignorance by outsiders who lack sympathy and knowledge. In his

words,

“Some deny the character of law to Africa altogether; others declare that, if there were legal rules in African societies, those rules and their administration are or were characterised and dominated by belief in magic and the supernatural blood-thirstiness and cruelty, rigidity and automation, and an absence of broader sentiments of justice and equity” (Allot 1960: 55).

For Allot, these expressions of ignorance about African law have been partial for two reasons: in the first instance, such accounts only tell part of the story and secondly, their expression concerning these set of laws apparently have been coloured by one form of prejudice or bias or the other whether consciously or unconsciously (1960: 55).

On his part, Elias attributes the ignorance, and hence, the under-representation of African legal theory to three factors: the predominance of missionaries in the field of education in Africa; the aping of western mentors by educated African elites concerning their own societies and their place in it and; the absence of political consciousness, pride of ancestry and cultural heritage on the part of the African (1963: 7-9). But then, as argued before, to be ignorant of an entity does not preclude the existence of that thing nor does it deny it of vitality and the substance that it has.

More precise, however, is the view that the recourse to ignorance as a potent factor in the under-representation of African legal theory does not capture the merit of its absence. As a matter of fact, the display of ignorance about African realities projects more than the absence of superlative knowledge about Africans and their world view. Our feeling is that ignorance does not seem to lie all alone in this task. It has a connection and counterpart in the projection of ideological and cultural superiority that, for us, is aptly traceable to the kind of historiography that Western jurisprudence subscribes to.

But then, analysis must go beyond this. Clearly related to the above is the issue of the absence of written records about African legal realities. Elias sums it up in the following observation. According to him,

“the absence of writing has therefore deprived the Africans of the opportunities for recording their thoughts and actions in the same systematic and continuous way as have men of other continents” (1963: 21).

Interestingly, this factor has commonly been appealed to in the denigration of not only African legal worldview but also philosophical reasoning. The question is must a body of thoughts about law or any other field of human endeavour be written before ascribing a jurisprudential nature to it?

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

But then what is yet to be explored in the critical sense as a credible explanation for the under-representation of African jurisprudence in systematic reflection on general jurisprudence, for us, is the peculiar historiography which the western world cooks up for itself. It is believed that Eurocentrism has a peculiar historiography that is antithetical to African realities. It is this Eurocentric historiography that calls for urgent analysis and critical assessment altogether. Imbued in this kind of historiography are relentless racist and sceptical attacks, often justified by the invention of curious and spurious philosophical arguments and reasoning, on African realities.

Eurocentrism, both in its present and past forms, relies heavily on the development of what Grosz calls positive historiography in demolishing the rich influx of non-western ideas. Just like positivist historiography, which interprets the past in its own image, in a similar way, Eurocentrism has interpreted American-European values, relations and conceptions in law, jurisprudence, morality, justice in non-western (pre-modern) societies as lacking and incomplete as compared to positivism which Western society sees as the apex of development as far as relations in jurisprudence and conceptions of law are concerned. The epistemological implications and fallout of positivism especially as championed in science breeds, imperceptibly, a kind of anthropological scepticism and racism.

Trenchantly, what is suspected as responsible for the varying shades of the evils of Eurocentrism is the view that it subscribes to a positivist historiography that defines the past by its own image, inevitably leading to the absurd conclusion that realities, conditions, perceptions and values in non-western societies are inherently lacking and incomplete when compared to

western society seen as the apex of development.

Implied in this kind of positivist historiography of course are reckless bend, relentless reliance and excessive dependence on the Comtean positivist tradition which absolutised progress and science. If positivist historiography interprets the past in its own image, it follows that imbued in this image is what Comte referred to as progressive evolution which was to him “an ultimate law governing historic phenomena” in which science, as a human activity, has defined for itself the essential role of the solver of all social problems including moral ones (see Brecht, 1989: 171).

In this Comtean socio-positivist worldview, an impartial understanding of social reality can only be obtained when proper scientific methodologies are applied. In this positivist inclination, only the methods of observation and measurement by an objective, impartial observer, some say spectator, can help us arrive at indelible and impeccable truth about social reality. Observation is here construed as a search for what is hidden, not just because it is hidden, but because its exposure will facilitate an intimate, sustained and productive relationship with the world.

Whether in science, ethics, sociology or law, it is very clear that the very object of positivist attack is the explicit rejection of the unbridled sway of metaphysical systems and doctrines. For Comte, social reality and history in general were at their worst when human progress were subjected to the marching parameters of metaphysics in an epoch which can be best described as nothing more than speculative and unscientific. The scapegoat, clearly, was metaphysics and theological systems.

Again, the views of the Neo-positivists against metaphysics were unsparing and unequivocal. Their physicalists propositions put metaphysics to a dead end, it seemed. Metaphysics and propositions drawn there from such as “there is a God who is imperceptible to human senses” or that “the soul of man is immortal” are neither true nor false. They are simply meaningless. Implicit, also, in the positivist attack on the idea of naturalism in legal discourse is the rejection of metaphysical doctrines in our analysis of legal concepts.

But then, 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. Hence, a recourse to their metaphysics. This metaphysics cuts across and explain 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 is classified as the people's methodologies or way 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” (1973: 3).

According to R.G. Collingwood (1940), the task of metaphysics in every age consists in the framing, the decomposition and the analytic exposition of the lines and parts of each cultures worldview. That is why Collingwood considers metaphysics to be the historical science that aids us in uncovering the Absolute Presuppositions of each culture in every age and epoch.

Understandably, science has revolutionised the world in terms of its contribution in our understanding of the world and social reality. It is however obvious that there are several limitations inherent in this Comtean positivist inclination. In the first instance, since it is the goal of this brand of positivism to predict and control social reality, the possibility of restricting or limiting different groups' access to the means of gaining knowledge is heightened beyond proportion.

Again, questions of value cannot be solved by this positivism because moral problems, for instance, cannot be solved by science simply because scientific method cannot even state what the moral goals of societies and individuals should be. Besides, when societies advance moral goals for the guidance of each society, it is conclusive that what are needed to attain to such moral goals are not scientific decisions entailed in this positivism but moral decisions. Societies attain to these moral goals not by scientific methods but by recourse to ultimate value judgements.

And what is more, the positivist agenda in general whether in law or in science ignores some possibilities open to human understanding: one, the

existence of realm in which the facts therein are inaccessible to human senses; two, the recognition of some facts about the world which are not reportable in a sensory manner or by reference to sensory perceptions. But to disregard such statements as meaningless because they do not conform to the verification principle as held by the Neo-positivist is at best to be engaged in one form of the *petitio principii* fallacy.

The scepticism and racism inherent in Eurocentric historiography, especially as it relates to its programme of exclusion of African realities, has its foundation in the works of many great Western philosophers whose philosophical temperament have been coloured by racial prejudice. Of central interest is the racist thought of David Hume. Hume had contended very strongly in one of his classical works the denial of any item of great significance among the Negroes and Africans in general. In his words:

“I am apt to suspect the Negroes and in general all the other species of men (for there are four or five different kinds) to be naturally inferior to the whites. There never was a civilized nation of any other complexion than white, nor even any individual eminent either in action or speculation. No ingenious manufactures amongst them, no arts, no sciences... there are Negroe slaves dispersed all over Europe, of which none ever discovered any symptoms of ingenuity; tho' low people, without education, will start up amongst us, and distinguish themselves in every profession. In Jamaica indeed they talk of one negroe as a man of parts and learning; but it is likely he is admired for very slender accomplishments, like a parrot, who speaks a few words plainly” (Hume 1854: 228-9; toponyms in all caps altered).

However, the obvious inconsistency in the thoughts of David Hume concerning human nature in general can be validated in the fact that five years before he made the assertion above, Hume had written that human nature with respect to mental attitudes, cognitive abilities and dispositions knew no bound and distinctions. In his words:

“It is universally acknowledged that there is a great uniformity among the actions of men, in all nations and ages, and that human nature remains still the same, in its principles and operations. The same motives always produce the same actions: the same events follow the same causes. Ambition, avarice, self-love, vanity, friendship, generosity, public spirit: these passions, mixed in various degrees, and distributed through society, have been, from the beginning of the world, and still are, the source of all the actions and enterprises, which have ever been observed among mankind. Would you know the sentiments, inclinations, and course of life of the Greeks and Romans? Study well the temper and actions of the French and English” (Hume 1988:

77-8).

What clearly and specifically are the major themes in Humean rejection and neglect of the realities of Africa in general? In the significant sense, Hume's racial theory or law became the point of justification for claims of superiority of white over blacks. In fact, four themes emerged in popular coinage in legitimating the issue of slavery all over Europe. These four themes are as follows:

1. That mental and moral capacity of non-whites differs markedly from whites (Linnaeus 1806);
2. That being non-whites was an essential defect on its own; the normal, natural condition of man was whiteness but due to some unfortunate environmental factors, some humans have lost their whiteness and with it, part of their normal human nature (Buffon 1817: 207; Blumenbach 1969)
3. Some beings that look human are not really so but are lower on the chain of being and thus represent a link between humans and apes (Long 1976);<sup>2</sup>
4. That there are several theses that separate human lines of creation and/ or evolution with Caucasians being the best (Brackman<sup>3</sup> 1977;

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<sup>2</sup> See Long, L. *History of Jamaica; or General Survey of the Ancient and Modern State of that Island: With Reflection on its Situations, Settlements, Inhabitants, Climate,, Products, Commerce, Laws, and Government*. New ed. with a new intro by George Metcalf, v. 3, London: F. Cass, 1970. On page 356, Long advocated the view that Negroes are lower on the chain of being than the rest of mankind. They are closer to orangutangs than to other men. In Long's view, a white moron is closer to the philosophical definition of man than a black genius, or as he put it, the "wisest black, red, swarthy, or sooty individual."

<sup>3</sup> Brackman cites the Talmud as the source for the Afro-phobic "Ham" curse.

"Ham is told by his outraged father that, because you have abused me in the darkness of the night, your children shall be born black and ugly; because you have twisted your head to cause me embarrassment, they shall have kinky hair and red eyes; because your lips jested at my expense, theirs shall swell; and because you neglected my nakedness, they shall go naked."

Bracken 1973).<sup>4</sup>

Armed with these theories, it is to be noted that Hume became an infamous proponent of philosophical racism when the slave trade was going on in England and his racial outbursts at that time were used by racists to justify slave trade. What is of interest and curious to us is that Hume's philosophical racism and the very basis on which they stand are at variance to his avowed principles of empiricism which are experience and observation. In fact, as argued by Eric Morton, Hume's views about Africans and Asians had no empirical foundation. In his words:

"Hume's notions about Africa and Africans, Indians and Asians were not based on factual, empirical information which he had gained by "experience and observation." No, his empirical methodology did not fail him nor did he fail it. The issue is that he never had an empirical methodology to explain racial and cultural differences in human nature. He only pretended that he had. I argue that the purpose of his racial law was not one of knowledge, but one of justification for power and domination by some over others" (Hume 2002).

But then, Hume is not alone in this procession of philosophical racism. The same can be said of the German philosopher, G. W. F. Hegel. Hegel's philosophical racism was notorious. The pertinent question is why is there so little, if any, respect for and, as a consequence, interest in African phenomena and their philosophical resonances? The answer to the question must not be found to consist in the fact that Africa holds no promising philosophical itinerary nor should it consist in the view that philosophy itself is not interested in what Africans think, say or do. These explanations do not portray the heart of the matter. Imbued in the peculiar absence of African phenomena in the field of philosophy, and impliedly, in the area of jurisprudence, is the politics of social history. In Olufemi Taiwo's language, the peculiar absence of Africa in the tradition of Western philosophy and jurisprudence lies

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See Brackman, H., 'The Ebb and Flow of Conflict. A History of Black Jewish Relations Through 1900', Unpublished doctoral dissertation, Los Angeles: University of California, 1977, pp. 79-81.

<sup>4</sup> Bracken cites a number of scientific and anthropological theories which sought to make racism scientifically respectable. See Bracken, H., 'Essence, Accident and Race', *Hermathena*, 116 (1973): 91-96.

in the chilling presence of Hegel's ghost and in the continued reverence of that ghost by the descendants of Hegel. In Taiwo's words:

"I submit that one source for the birth certificate of this false universal is to be found in Georg Wilhelm Friedrich Hegel's *The Philosophy of History*... The ghost of Hegel dominates the hallways, institutions, syllabi, instructional practices, and journals of Euro-American philosophy. The chilling presence of this ghost can be observed in the eloquent absences as well as the subtle and not-so-subtle exclusions in the philosophical exertions of Hegel's descendants. The absences and exclusions are to be seen in the repeated association of Africa with the pervasiveness of immediacy, a very Hegelian idea if there be any" (1998).

This can be validated in the writings and submissions of Hegel about Africa. According to Hegel,

"Africa proper, as far as History goes back, has remained-for all purposes of connection with the rest of the World-shut up; it is the Gold-land compressed within itself-the land of childhood, which lying beyond the day of history, is enveloped in the dark mantle of Night. Its isolated character originates, not merely in its tropical nature, but essentially in its geographical condition" (Hegel 1956: 91).

From the above, the necessary deduction is that Europe, in the words of Hegel, sees the African world as not only existing without a history but is essentially not part of world history. This is because the central ideas of universality and rationality do not exist in Africa. What exists is Africa's and African's attachment to nature which is at best an astounding display of the absence of the quality of universality and rationality. One of the promising items of universality, according to Hegel's narrative, is the possession of transcendence. One way of describing this is what can be referred to as "the unacknowledged African being" courtesy of Hegel. Because the African lacks being, he is condemned to have no significant achievement in world history.

This explains why no accurate representation is given of Africa in the areas of ethics, law, metaphysics and epistemology. Africa's and African's contributions to areas of knowledge production such as anthropology, political science have, in recent times, being consigned to what is dubiously called "African Studies." Even then, the metaphysic or the ontology of difference between the 'supreme west' and 'Africa' is often trumpeted. Also worrisome is the view that even where it is glaring that African scholars are

at home with some of the aching questions on the subject of justice, truth, political obligation, immortality of the soul and philosophy, their answers are often despised as having no philosophical application. Taiwo's language is pungent in its apt capture of the lamentation of the African mind. According to Taiwo,

“All too often, when African scholars answer philosophy's questions, they are called upon to justify their claim to philosophical status. And when this status is grudgingly conferred, their theories are consigned to serving as appendices to the main discussions dominated by the perorations of the “Western Tradition” (Taiwo 1998).

Having succeeded in banishing the African reality, possibility and cast from the rest of the world, the sum of Hegel's conclusion about Africa can be pictured in the terse but profound statement that Africa falls short of the glory of man. Hegel's conclusion in this respect is disturbing. He says:

“From these various traits it is manifest that want of self-control distinguishes the character of the Negroes. This condition is capable of no development or culture, and as we see them at this day, such have they always been. The only essential connection that has existed and continued between the Negroes and the Europeans is that of slavery ...” (Hegel 1956: 98).

In the significant senses, therefore, Humean and Hegelian notions and prejudice about Africa is not founded on anything empirically true – not on observation, experience and empirical history. They derive their foundation on the issue of slavery and the distorted interpretations of history. Significantly, the history of slavery in relation to Africa is not a product of the unhumanity, man-less-ness and irrationality of the African mind or psyche but in the history of what can be tagged “our dependence on and dominance by others.” Dependence and dominance, in their full import, do not contribute to the making of authentic interpretation of Africa's participation in history.

### *Conclusion*

The problem of the twentieth century, as William DuBois conceives it

“is the problem of the colour line – the relation of the darker to the lighter races of man in Asia and Africa, in America and the Islands of the Sea.”

Beneath western historiography is the attempt to depersonalise and dehumanise the identity of the African. One of the several attempts by which this project has been carried out is the subjection of philosophical ideas and doctrines to the prevailing socio-political and economic conditions which characterise the age in which they were invented. This is no doubt true in the philosophical thoughts of David Hume and Hegel concerning the African and Africa in general.

Today, the task of constructing African scholarship in ethics, jurisprudence, philosophy and even politics through his history is not only challenging but made more intellectually stimulating given the wealth of analysis afforded by a growing community of scholars in not only interrogating what is considered as anomalous but also in unearthing the facts about the African past. In most cases, the wrong perception of African jurisprudence, for instance, stems from a deliberate neglect and misunderstanding of the symbolic and practical logic of a community viewed from the normative perspective of the community concerned. Much of this sceptical and racist trend characterised the heart of anthropological perspectives and reports emanating from the west. No empirically sound general theory of law has been and will be elaborated in general jurisprudence unless this brand of philosophical scepticism (about Africa and its jurisprudential imprint) imbued and energised by racism is done away with.

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