Chapter 4
Decoding Afrocentrism: Decolonizing Legal Theory

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4.1 Introduction

Broadly speaking, the term 'theory' is defined as a "supposition or system of ideas explaining something" (Allen 1989, p. 801). Put differently, Okafor (2008, pp. 372–373) views a theory as a systematic and formalized expression of all previous observations, and is predictive, logical, and testable. Thus, 'theory' refers to a proposed explanation of empirical phenomena, made in a way consistent with scientific method. What this means is that a theory is employed as a framework for describing the behavior of a related set of natural or social phenomena. In this sense, the task of 'legal theory' – which is also known as 'jurisprudence' or 'legal philosophy' – is the "clarification of legal values and postulates up to their ultimate philosophical foundations" (Friedmann 1969, p. 449).

The philosophy of law is commonly known as 'jurisprudence', which can further be broken down into analytical and normative jurisprudence. Normative jurisprudence is essentially political philosophy, and poses the question: 'what should law be?', whereas analytic jurisprudence asks: 'what is law?' In the twentieth century, Hart (1961) argued that law is a system of rules, divided into primary (rules of conduct) and secondary ones (rules addressed to officials to administer primary rules). In this sense, secondary rules are further divided into 'rules of adjudication' (to resolve legal disputes), 'rules of change' (allowing laws to be varied) and 'the rule of recognition' (allowing laws to be identified as valid) (Bayles 1992, p. 21).

When African countries were colonized by the Europeans, the colonial administrators often commissioned studies in an attempt to understand 'their subjects' better in the

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exercise of their imperial power. The Europeans transplanted their Western laws to African soil. In so doing, the colonialists did not take any interest in analyzing the received European law's interaction with, and impact on, the indigenous laws and customs which it co-existed within the colonial territories. Instead the European missionaries were of the belief that African customary law was bad for the new religious dispensation and, therefore, should be abolished holus bolus for that sake. The colonialist concluded that native laws were pagan customs which ought to be destroyed and substituted with higher colonial laws (Ayinla 2002, p. 162; Elias 1956, p. 25).

Until recently, scholars of African law were mainly concerned with descriptive discourse and did not focus on the impact of the transplanted colonial laws on the indigenous laws and customs. This gap in the assessment of indigenous African laws has contributed to the predominance of mainstream Anglo-Saxon or Western legal theory and a paucity of knowledge or understanding of the customs and laws in ancient African societies. The hallmark of African legal theory is that is subscribes to natural law as opposed to legal positivism. In contrast to positive law, natural law is universal, binding all people and all States. It is, therefore, a non-consensual law based upon the notion of the prevalence of right and justice. This is most apparent within the field of international law. Natural law was generally displaced by the rise of positivist interpretations of international law (Ticehurst 1997). According to Schachter (1991, p. 36),

> [i]t had become evident to international lawyers as it had to others that the States that made and applied law were not governed by morality or 'natural reason'; they acted for reasons of power and interest. It followed that law could only be ascertained and determined through the actual methods used by the States to give effect to their 'political wills'.

As such, legal theory is viewed through Eurocentric or Americanized lenses. Further, Rajagopal (2006, p. 781) observed that 'it is very important not to equate hegemonic international law with United States unilateralism. Rather, one must pay close attention to how multilateral mechanisms such as the United Nations Security Council are also being used to strengthen hegemonic international law'. An aspect of jurisprudence that has not been adequately pictured in philosophical reflections on the nature of law is the idea of African legal theory. While there are several explanations for this omission, the main culprit is the imperial process of Eurocentrism of international legal discourse. The other reason is that apparent absence of prominence of African voices on the subject matter of jurisprudence in general. This view is confirmed by Rajagopal (1998–1999, p. 2) who laments that '[e]ven the isolated legal academics who study or teach 'Law and Postmodernism in the United States, reveal very little familiarity with any writers from the Third World'. For Slater (1994, p. 113), this vacuum arises from the division of labor in knowledge production that:

> the tendency to erase theory from the history of the non-West can be seen as a pivotal strategy in the West's construction of an international division of intellectual labor, and the turn towards a global agenda has been marked by a continued reflection of the same construction.

The issue of division of labour between the West and the rest is a departure from the initial position of debunking the existence of African philosophy altogether. In any case, there is burgeoning regiment of scholars of African philosophical

tradition and Third World Approaches to International Law (TWAIL) Scholars who have quashed the skepticism about non-Western jurisprudence, including African philosophy. Nonetheless, Williams (2006, p. 33) notes that although 'the general denial of African philosophy has died a natural death, the implicit denial of African jurisprudence seems to persist'. Williams (2006) contends that a study of the classical and contemporary texts 'reveals an obvious and conspicuous lacuna and pertinent discovery that presents itself to us is the fact that conspicuously missing in this panoramic canonisation of jurisprudential works is the canonisation of African intellectual resonance and mental disquisition on the idea of law literature'.

For Williams, the dilemma about African jurisprudence raises two important but separate questions. The first is: what is the nature of African jurisprudence? The second relates to what accounts for the dilemma of the canonisation of African jurisprudence in mainstream jurisprudential literature (2006, pp. 34–35). Although both these questions have been addressed by several writers before, this chapter seeks to identify and decode the nuances of Afrocentrism in the mainstream legal theory. Dike and Ajayi (1968, p. 394) assert that 'every people that [do] not want to lose its identity must link up with its past' (cited in Oladosu 2001, p. 22). Therefore, this chapter builds upon the excavation by various African jurists and TWAIL scholars to liberate legal theory from 'the totalizing tendencies of Eurocentric production of knowledge' (Rajagopal 1998–1999, p. 4). The chapter also draws on the oral and visual traditions of ancient African societies since the vast majority of indigenous African laws and customs have not yet been reduced into writing.

4.2 Why an African Legal Theory?

Perhaps before answering the question as to why should there be a concern of African legal theory, the issue that needs to be addressed is the importance of a legal theory. To begin with, law is a system of rules and guidelines which are enforced through social institutions to govern behavior (Hart 1961). The way a society is constituted, including the nature of its laws, is usually reflective of the fundamental values of that society itself. Gluckman (1963, p. 198) opines that legal concepts are more or less ethical imperatives. As such, jurisprudence is basically a human-centred enterprise. Jurisprudence is about humans and thus, law is about humans.

This assumption underlies the contribution of jurisprudence in all cultures (Williams 2006, p. 41). This explains why concepts of law and justice, among others, lie at the heart of the analysis and understanding of contemporary problems faced by humanity in general and communities, in particular. For this reason, legal theory is a useful tool in the search for solutions to problems faced by communities. However, Rajagopal puts a caveat that:

> The prospects for the transformation of international law into a purely counter-hegemonic tool, capable of aiding the weak and the victims, and of holding the powerful accountable, are bleak on its own [further] international law is only a small (though important) part of counter-hegemonic power in the world today. The future of the world–its ability to deal with problems of peace, war, survival, prosperity, planetary health and pluralism–depends

> on a range of factors, including the politics of the 'multitude' [,i.e.,] the governed. The stakes in legal reform between an agenda dictated by elite politics alone and an agenda shaped by mass politics, have never been higher. (Rajagopal 2006, p. 780)

That notwithstanding, African legal theory still has to be emancipated from the Westphalian legal philosophy in order to contextualize contemporary problems faced by Africans in Africa and conceptualize effective tools for solving those problems. As it has been noted in the peace or justice debate obtaining in the Darfur crisis, international law seems to be insufficient to deal with some situations peculiar to Africa. Another example is the inaction of the UN Security Council in the face of genocide Rwanda in 1994. By restricting the authorization of the use of force on the matter of enforcing fundamental rules of international law in the Security Council, the drafters of the UN Charter created an inherently selective and weak system (White 2007, p. 31). This view is strengthened by Oladosu (2001, p. 1) who noted that:

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

It follows, therefore, that African legal theory can play a central role in the quest to find African solutions to African problems by virtue of being tailor-made to the continent. For example (Rajagopal 2006, p. 775) has noted that:

> Current human rights discourse and practice has a choice, a fork in the road […] it can either insinuate itself within hegemonic international law or it can serve as an important tool in developing and strengthening a counter-hegemonic international law. By ignoring the history of resistance to imperialism, by endorsing wars while opposing their consequences, and by failing to link itself with social movements of resistance to hegemony, the main protagonists of the Western human rights discourse are undermining the future of human rights itself.

It is precisely this very different relation of the personal to the political that makes the Third World texts so alien to the West (Rajagopal 1998–1999, p. 12). Further, discerning African legal theory would help to hear and understand African voices such as appreciating the role of Africa in the United Nations and guide the role of the United Nations in Africa. Furthermore, understanding African legal theory would help the international community to appreciate the concerns by African countries about the 'selective' justice of the International Criminal Court, which is seen as a Western tool used only to persecute Africans. The point made here is that understanding African legal and philosophical thought is useful to understand how they may be relevant to the resolution of these problems. Positive law does not always have answers to problems and it is insufficient to respond to contemporary problems. This explains why Judge Koroma, in his dissenting opinion in the *Nuclear Weapons* Advisory Opinion, challenged the whole notion of searching for specific bans on the use of nuclear weapons, stated that 'the futile quest for specific legal

prohibition can only be attributable to an extreme form of positivism' (Judge Koroma 1996, p. 14).

The other point is to highlight the important role of Africa as a contributor to legal theory. For example, with reference to the Advisory Opinion of the International Court of Justice (ICJ) on the legality of the threat or use of nuclear weapons, proponents of the illegality of nuclear weapons emphasized the importance of natural law, urging the ICJ to look beyond the positive norms of international law. The Martens Clause supports this position as it indicates that the laws of armed conflict do not simply provide a positive legal code, they also provide a moral code. For example, this ensures that even the views of smaller States and individual members of the international community can influence the development of the laws of armed conflict. Ticehurst (1997) argues that 'this body of international law should not reflect the views of the powerful military States alone. It is extremely important that the development of the laws of armed conflict reflect the views of the world community at large'.

4.3 Is There an African Legal Theory?

By the end of the nineteenth century, concepts of legal positivism and State sovereignty had become dominant in international legal thinking, leading to extensive codification of legal instruments (Ticehurst 1997). As pointed earlier, critics have doubted the existence of law in ancient Africa due to lack of, *inter alia*, contemporary styled legal institutions, such as the police force, parliaments and courts (Ayinla 2002, p. 148). Even if others agree that African societies have not been lawless per se, the validity and jurisprudential character to the status of indigenous African laws is questioned (Ayinla 2002, p. 148; Williams 2006, p. 35). At the time of colonization of Africa, the Europeans encountered natives with well-established indigenous and religious systems of law and custom. Thus, conquest did not destroy these systems, although it subordinated them to metropolitan Western legal traditions and changed their relationship to political authority and productive relation (Roberts and Mann 1991, p. 8).

Although historical reports indicate that African traditional systems have had a system of rules and governance, there has been no indication whether Africans had or have a theory of law (Williams 2006, p. 35). Taiwo (1998) has noted that 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'. (Williams and Moses 2008, p. 152).

The question then is: how does a theory come into being? According to Hart (1961, p. 78), the beginning of wisdom in the effort to develop an adequate theory of law is to learn to conceive the law as a form of social rules. There are at least two ways in which a legal theory could be said to have been adopted by a legal system.

The first relates to what may be called a 'predominant position' especially in relation to legal positivism. This may be a situation where jurists and legal scholars of positivist persuasion constitute a significant majority or wield significant or dominant intellectual influence on the practices and discourse in a legal system. The second is where a 'rule of recognition' of a legal system has a lacuna, allowing the satisfaction of some moral standard or another legal rule, – although it may be morally deficient in one way or the other – it would still be considered a valid law of the system (Oladosu 2001, p. 2). Further, according to Obilade (1995, p. 357):

> There cannot be an adequate theory of law without consideration of philosophy. In propounding a theory of law we are philosophising about law. In philosophising about law we may be presenting a theory of law.

Throughout history of mankind, man never existed devoid of laws obeyed by him, although such laws may have existed without articulating them in a sophisticated manner as the modern system of law (Ayinla 2002, p. 148). It is clear that 'African peoples, in the past and at present, are not different from the rest of humanity in the possession and exercise of innate powers of philosophical reflection, and in being endowed with a healthy dose of common sense' (Oladosu 2001, p. 15). This buttresses the fact that even ancient African societies had laws that governed the communities. According to Elegido (2001, p. 127; Elias 1956, p. 1):

> [T]raditional African Societies certainly did have systems of social control which closely resembled modern legal systems. In fact, when those African legal systems are studied in details it is easy to agree […] that the differentiation between African laws and laws of other people is only superficial.

Therefore, to say that indigenous African societies did not have laws because they lacked formal courts, police and legislatures, is to focus on the form of social arrangements rather than on their function of law. Ayinla (2002, p. 166) states that:

> Certainly, one cannot find in African societies a parliament with all its modern trappings, but there were specific procedures for creating new rules and amending old ones. In societies without Chiefs, like the Igbo or the Kikuyu, new legal rules, when needed, were made by the councils of elders. In societies with Chiefs, like the Tswana in Southern African it was the Chief who made new legal rules in the tribal assembly.

In the same vein, (2002, p. 166) adds that 'on the essence of judges, of course there were no bewigged gentlemen sitting in Oak-panelled rooms, but there certainly were persons or bodies which specialized in deciding disputes concerning legal norms and their implementation'. As regards the police, Ayinla (2002) maintains that there 'existed also in many of these societies' specialized officials whose functions was to help in the enforcement of the rulers' decisions and keep order'. Ayinla (2002), therefore, counsels that:

> The general point is simply that we find arrangement' for the discharge of the essential functions of law-making, adjudication and enforcement, but the forms of these arrangements are different from those prevalent in modem societies for the excellent reason that they had to operate under very different circumstances from those which now obtain. (Elegido 2001, p. 126; Elias 1956, p. 34)

Nevertheless, it remains generally true that the judicial institutions of the more highly organized political societies such as the West, clearly manifest the operation of legal principles than do those of the less politically organized societies, such as the rest. The fact that one justice dispensing machinery is more organized than the other does not mean that the latter does not dispense justice. It is, therefore, incorrect to say that indigenous African law is simply not law because it is different to the kind of law customary to Western societies. The widespread acceptance of the indigenous laws and customs coupled with the 'sincere and deeply held expectations of compliance' by the society tends to assert the normative value of indigenous African customs and laws. The mere fact that such customs and laws are not drafted in the Western tradition does not deprive them of their normative validity (Sheldo 2008, p. 22). Legal theory does not always have to be in black and white. According to Williams (2006, p. 38) below,

> The import is that philosophy essentially deals with the art of wondering. Wonder starts and lubricates the philosophical enterprise. Such inquisitive thought systems are demonstrated by the human mind engaging itself in the search for answers to some fundamental questions and issues of life such as death, the good life, the meaning of life etc. […] what is of interests is that a system of philosophy does not lie in the mere fact that such system of thought was written down. It is our presumption that […] philosophy consists not only in its existence in written form but also in substance.

The degree of sophistication attained by the judicial organs of a given community is directly related to the stage and form of its social organization. Western societies with highly developed political system invariably tend to have more advanced body of legal principles and judicial techniques than those with a rudimentary political organization (Ayinla 2002, p. 164). Given the heritage of privilege, in developed legal systems there are usually hierarchically graded courts with well-defined machinery for the enforcement of judicial decisions. Whereas in less developed or developing legal systems, 'rules rather than ruler, functions rather than institutions, characterize the judicial organization of these societies' (2002, p. 164). The apparent informality of the legal process does not mean that the actual situation is chaotic, since the mechanism of choosing the adjudicating elders for the settlement of disputes, as well as that of enforcing their decisions, follows a clearly recognized pattern, even if the means adopted appear casual to the unwary observer (2002). This view is confirmed by Gluckman (1967, p. 28) who has observed that:

> I have studied the work of African courts in Zululand and Rhodesia, and found that they use the same basic doctrines as our courts do African Legal Systems, like all Legal Systems, are founded on principles of the reasonable man, responsibility, negligence, direct and circumstantial and hearsay evidence, etc. African judges and laymen apply those principles skillfully and logically to a variety of situations in order to achieve justice.

In this regard, Murungi (2004, p. 525) has made a persuasive case for the separation of African jurisprudence from the rest of jurisprudence, asserting that:

> Each path of jurisprudence represents an attempt by human beings to tell a story about being human. Unless one discounts the humanity of others, one must admit that one has something in common with all other human beings […] what African jurisprudence calls

> for is an ongoing dialogue among Africans on being human, a dialogue that of necessity leads to dialogue with other human beings. This dialogue is not an end in itself. It is a dialogue with an existential implication.

It, thus, suffices to say that human society is not necessarily in a 'state of nature' (i.e. lawless) merely because it lacks a sovereign commander, a regiment of uniformed policeman, an imposing penitentiary and courts. The mechanism for securing law and order that the rules of human behaviour may be regarded as law in any given society (Elias 1993, pp. 12–13). Ayinla (2002, p. 151) states that 'the fact that accepted rules though generally unwritten, were observed as binding upon the various members of these different communities'. It cannot be denied that Africa is made up of a diverse set of countries, with varied cultural heritages and different historical experiences (Chimni 2006, p. 4). Yet African societies 'were inferably held together with shared values and their collective responsibility and conscience constituted the reality of society as to what obtains' (Ayinla 2002, p. 151). African law has come to be identified as a term that described the customary laws of the people who have come under a colonial rule (2002). Granted, to decode an African legal theory, there is a need to see what can be salvaged from the legal systems and practices of indigenous people through socio-legal and empirical studies (Holleman 1974, p. 13; Oladosu 2001, p. 15).

4.4 The Nature of African Theory

The dominant philosophy of legal theory is positivist. The choice of a legal theory in the mainstream Western legal theory mainly revolves around two broad considerations – either theoretical or moral advantage; or both (Oladosu 2001, p. 1). Although mainstream legal theory claims to be universal, it has European and Christian origins (Mutua 2000, p. 33). In terms of African legal theory the preference extends to cultural grounds. This cultural orientation has led to an inescapable conclusion that the positivist legal theory is unsuitable for the African legal system. Naturally, proponents of this view have subsequently inclined to natural law theory (Oladosu 2001, p. 1; Gluckman 1967, p. 28). One of the reasons for the decline of natural law was that it was wholly subjective, and contains contradictory norms of natural law (Ticehurst 1997).

However, there are principles, such as the Martens Clause, which provide an objective means of determining natural law: the dictates of the public conscience. 'This makes the laws of armed conflict much richer, and permits the participation of all States in its development' (Ticehurst 1997). Ironically, Ticehurst (1997) has noted that even the opposition of natural law by positivist is not consistent as the 'powerful military States have constantly opposed the influence of natural law on the laws of armed conflict even though these same States relied on natural law for the prosecutions at Nuremberg'. The judgment of the Nuremberg Tribunal, which to a great extent relied on natural law to determine the culpability of the Nazi high command, confirmed the continuing validity of natural law

as a basis for international law in the twentieth century. This position is supported by the International Law Commission (1994, p. 317).

There are divergent views as regards the nature of law and its function in every relevant society (Williams 2006, p. 1). Legal positivism posit 'a theory which recognizes as valid laws only such enforceable norms as are enacted or established by the instrument of the state'. The consequence of this conception of law is that for the positivist, 'only statute laws are laws indeed, by the mere fact that they have been posited by an appropriate political authority' (Okafor 1984, p. 157). Okafor contends these conceptual restrictions leads legal positivist to exclude from the province of jurisprudence, 'such fundamental questions as,' what are the essence of law?', 'why is the citizen obliged to obey the law?', 'what is the nature of a just and unjust law?', 'is what is legally wrong also morally wrong?' (Oladosu 2001, p. 7).

It is generally considered that a good law must conform to the spirit of the society because law is a developing social institution which owes its origin not to man's nature but to social convention (Ayinla 2002, p. 147; Lloyd and Freeman 1985, p. 549). Therefore, to understand the nature of African laws one has to dig deeper into the norms and traditions of the society as it permeates the totality of the facet of the life of the society. There are several legal doctrines that have the DNA of African juristic thought – the characteristics of 'African-ness' –in them as outlined below.

4.4.1 Rooted in Custom and Culture

In Africa, law is an integral part of culture (Ayinla 2002, p. 147). This implies that law cannot be separated from the culture of Africans since it is in-built in the life of Africans. Law and custom 'cuts across the totality of the facet of the life of Africans' (Ayinla 2002, p. 167). What this means is that 'juristic thought is embedded in the social relations of the people as obtainable in the society or community' (2002). Williams and Moses (2008, p. 156) have noted that culture has more than one meaning:

> 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 artifacts, 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.

There are several theoretical approaches to understanding the nature of the relation between law and morality in African jurisprudence (Williams and Moses 2008, p. 156). For example, the 'culturalist thesis' claims that law and morality are both instances of a people's culture or way of life (2008, p. 153). The 'conceptual complementary' thesis, informs that law is incomplete without morality; and morality is

equally incomplete without law (Williams and Moses above). In this sense, to violate law is to win the admiration of half the populace, who secretly envy anyone who can outwit this ancient enemy; to violate custom is to incur almost universal hostility. For custom rises out of the people, whereas law is forced upon them from above (Will Durant 1954, p. 26). According to (Williams and Moses 2008, p. 156):

> 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.

In Africa, different tradition, belief, custom, practice, religion, value as well as background have always existed in communities or societies. These notions have regulated the affairs of communities and served as the basis of the system of administration of justice. The primary objective of such a system was to promote communal welfare and foster communal well-being by reconciling and harmonizing the divergent interests of different peoples in the society.

However, the drawback to discern an African legal theory on cultural ground is the rich cultural diversity that is the hallmark of the African continent (Oladosu 2001, p. 22). Oladosu (2001, p. 24) contends that where such areas of moral and religious differences are fundamental, as is usually the case in culturally diverse societies. And such moral or religious discrepancies may erode consensus in making and administering laws (2001, p. 24).

However, Nwakeze (1987, pp. 101–105) counsels that 'in the midst of the diversity of African cultures, there is striking cultural uniformity which allows us to talk of "African culture"'. In spite of the complex cultural diversity among African societies, it is possible to focus on the elements of cultural uniformity among these societies Oladosu (2001, p. 24).

To grant that there are elements of cultural uniformity is not in any way to retreat from the observation that there are also elements of cultural diversity among the various ethno-national groups in modern African states. To concede that citizens of African states would agree on many important points of moral values is, likewise, compatible with the rival observation that those same citizens, informed by different religious and ethical beliefs, might disagree on many important points of moral and religious values.

Therefore, in decoding an African legal theory from the various cultures amongst various societies in Africa, one should focus at the cultural practices, values and principles about which there is widespread agreement in the society (Oladosu 2001, p. 24).

4.4.2 Preserved in Proverbs

Proverbs played an important role as a vehicle of juristic thought in indigenous African societies. Thus, proverbs have been, and still are, a vital aid to judicial administration in matters of law and justice as well as traditional and socio-political

systems in Africa. This view derives from a proverb in Yoruba, which says: *'owe l'esin oro, bi oro ba sonu, owe laa fii wa a*', implying that: 'proverbs are the vehicle of thought: when the truth is elusive, it is proverbs that we employ to discover it' (Adewoye 1987, p. 1). Proverbs are usually anchored in tradition which is 'a belief or practice transmitted from one generation to another and accepted as authoritative, or deferred to, without argument' (Lord Acton 1952, p. 2). Flesichacker (1994, p. 45) defines tradition as 'a set of customs passed down over the generations, and a set of beliefs and values endorsing those customs'.

A tradition, therefore, is 'anything which is transmitted or handed down from the past to the present' (Shils 1981, p. 12). There is an obvious difference between culture and tradition. According to Gyekye (1997, pp. 218–212), 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 (Williams and Moses 2008, p. 159).

There are several proverbs that are used as guidelines for law and justice. For example, the English equivalent for '*usi umafuka pomwe payaka moto*' in Chichewa is 'there is no smoke without fire'. This proverb guides adjudicators to determine that there is an arguable case or merit in the allegations proffered in a given case and sometimes the proverb implies reversing the onus of proof of the accused or suspect to exonerate oneself.

Another example is the Chichewa proverb that goes, *'khuyu zodya mwana zipota wamkulu*'. Literally translated as 'berries eaten by a child affect the parent'. The proverb generally implies vicarious liability of a parent or employer for the wrongs of a child or employee, respectively. The proverb is akin to the concept of tertiary perpetrator, where a crime committed by one individual against another extends far beyond the two individuals and has far-reaching implications to the people from among whom the perpetrator of the crime comes. The notion of tertiary perpetrator is extended to the family of the principal perpetrator and the society where the principle perpetrator hails from. In this way, the punishment of the tertiary perpetrator is usually restitution, a fine and a social stigma until the status quo is reversed through manifestation of remorse. The African jurisprudence of vicarious liability, however, tends to support remedies and punishments that tend to bring people together.

4.4.3 Balancing Societal Equilibrium and Stability

The maintenance of equilibrium is one of the cardinal principles that underlie African conception of law (Ayinla 2002, p. 153). Law in African perception is not seen as apportioning of rights but an instrument of social control in terms of the maintenance of social harmony in the society. Rather, law in Africa is seen as an instrument of maintaining social equilibrium (2002, p. 147). In this sense, in Africa, law is basically used for the maintenance of continuous peaceful,

harmonious inter-personal relations among the members of the society as a whole (Oladosu 2001, p. 22). According to Ayinla (2002, p. 153):

> Distinction in terms of classification of law into either criminal or civil is meaningless to the Africans and can only aid in misconceiving the idea of law and justice. Law thus "comprises all those rules of conduct which regulate the behaviour of individuals and communities and which by maintaining the equilibrium of society are necessary for its continuance as a corporate whole."

Generally speaking, the idea of the law in African legal theory is not to create offences nor to impose criminality on individuals but rather it directs how individuals and communities should behave towards one another. Its whole object is to maintain societal equilibrium. In this way, the retributive or penal theory does not come into play. Driberg (1934, p. 231) illustrates that:

> An offence of Homicide is not punished from this point of view. What obtained is that when a member of a clan, family or community has been killed, the equilibrium having been disturbed, the law set in to restore it by either execution of the murderer or by payment of compensation. The execution of the murderer or diminishing of the property of his family is incidental to the underlying motive, which is in no sense whatsoever penal but restoration of the social equilibrium.

The kind of philosophy of law subscribes to the view that law and morality are not antagonistic to each other since, by virtue of their inherent origin and development, they both exist to further societal interests, which in the case of African jurisprudence, is the enhancement and maintenance of social cohesion and equilibrium (Williams 2006, p. 45).

4.4.4 Pursuit of Restorative Justice, Not Retributive Justice

In Africa, the concept of law and justice leans towards restorative justice rather than retributive justice as espoused by Western philosophy. The concept of justice 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 this view, Elias (1956, p. 287) maintained that the preoccupation with imprisonment as a way of dispensing criminal justice may not sit well with African customary legal practice to the extent that 'punishment of the offender and a corresponding satisfaction of the offended are two distinct questions that must be faced if real justice is to be achieved'. African customary legal practices tend to strike a more useful balance between these two requirements of justice in that they tended to put an equal or greater emphasis on the side of the need for restitution. This is why African jurisprudence is restorative rather than retributive (Wilson 2002).

In situations the offences are gross, African customary legal practices are still not penal or vindictive but aim at making punishment fit the crime committed (Ayinla 2002, p. 158; Oladosu 2001, pp. 13–14). The reconciliation and restorative justice are the primary considerations in African philosophy of law.

(Williams 2006, p. 45). Williams and Moses (2008, p. 153) clearly articulate the process of restorative justice that:

> In his administration of public law, the Chiefs, or whatever the Legal authority may be, sits as a judge and awards the appropriate sentences; but it would be more correct to call the inquiry into a private suit an arbitration rather than a trial, and very often no judgment is pronounced, the general opinion of court being obvious to everyone. (Driberg 1934, p. 242)

A clear example where African concepts of reconciliation and restorative justice prominently feature in providing the foundations for the creation of a legal and political institutions is the emergence of the Truth and Reconciliation Commission in South Africa. As many readers will know, the Commission was created to deal with the violence and human rights abuses of the apartheid era. Proponents of the Commission considered the idea of 'retributive justice' as 'un-African' (Williams 2006, p. 45). For this reason, one of the key objectives of the Commission was the need to promote social stability which was considered a greater good than the individual right to obtain retributive justice and to pursue perpetrators through the courts (Williams 2006, p. 45). Another example of restorative justice mechanisms in Africa are the '*gaçaça* trials' in Rwanda following the 1994 genocide in that country. Similar restorative justice mechanisms – translated as *culo kwor*, *mato oput*, *kayo cuk*, *aciluc* and *tonu ci koka* – are practiced by communities in Northern Uganda (Ocen 2007).

4.4.5 (Re) Conciliation and Compromise

The theory of reconciliation in terms of African legal theory derives from the fact that justice seeks to restore peace, harmony and existing relationship in African societies (Williams and Moses 2008, p. 153). Ordinarily, under the modern judicial process, the court finds, as to with whom lies the legal right. And as a fact finder, decides based on the facts before the court. On the whole, it is a matter of 'winner takes all' and the 'loser loses all'. In African setting it is a zero-sum game, as there is a need for continued fraternity between the parties to ensure a continued harmonious society. With reference to the Barotse of Northern Rhodesia, Gluckman (1967, p. 28) illustrates the framework for accountability and reconciliation in African societies thus:

> 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 judgment on the matter in dispute, but they had also, if possible, to reconcile the parties, while maintaining the general principles of law.

An embodiment of an African concept of reconciliation is again the South Africa Truth and Reconciliation Commission, which was established under the Promotion of National Unity and Reconciliation Act of 1995, *inter alia,* to advance the cause of reconciliation. The idea of reconciliation is to maintain a greater harmony between

the parties, which is perpetually undermined by resentment, anger, desire for vengeance in retributive justice (Williams 2006, p. 45; Wilson 2002). The idea of reconciliation of the parties in African societies can be equated to the processes of through mediation, conciliation, arbitration and negotiation in alternative disputes resolution in modern settings. Some like Ayinla (2002, p. 160) have even gone on to claim that alternative dispute resolution owes its origins to the African legal system.

4.4.6 Ubuntu–Interdependence and Collective Responsibility

The concept of 'ubuntu' constitutes the kernel of African traditional jurisprudence as well as leadership and governance. The word 'ubuntu' – the essence of being human – has its origins in the Bantu languages of Southern Africa. 'Actually, 'ubuntu' is a Zulu word, often adapted from the Zulu proverb 'umuntu ngumuntu ngabantu', which speaks particularly about the fact that a person cannot exist as a human being in isolation. It speaks about interconnectedness and interdependence of humanity. This probably helps to explain why Africans tend to see one another as a 'brother from another mother.' 'Ubuntu' is widely believed to be a classical African philosophy or worldview. The import of the word 'ubuntu' is 'I am because we are.' In 1996, the Chairman of the South African Truth and Reconciliation Commission, Archbishop Desmond Tutu, invoked the concept of 'ubuntu' explaining that: 'I am human only because you are human' (Williams 2006, p. 45). 'Ubuntu' is, therefore, regarded as an African communalistic ethic or humanist philosophy focusing on people's allegiances and relations with each other (Gade 2011). The 'ubuntu' philosophy was squarely applied to address injustices which were wrought by the notorious system of racial separation in South Africa, known as apartheid. For purposes of doctrine, 'ubuntu' has been described as:

> 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. (South African Government of South Africa 1996, p. 16)

In this sense, 'ubuntu' explains obligation as the moral relationship between the person, the individual and the community. This assertion is confirmed by the Somali proverb which says 'a man who owns one hundred goats but his relatives have nothing is poor'.[1] by a dissection of the 'ubuntu' philosophy further shows that it hinges on respecting human dignity and that the 'human rights' is not an imported concept in Africa. This assertion is fortified by a common Kinganda adage in Uganda that:

> *Ekitiibwa ky'omuntu eky'obutonde; okwenkanankana, wamu n'obuyinza obutayinza kugyibwawo ebyabantu bonna, gwe musingi gw'eddembe; obwenkanya n'emirembe mu nsi.*

[1] Cited in Lindy (2010), p. 28, 73.

What this saying means is that 'the dignity of a human being is fostered by equality and freedom in human rights'.[2] Although the concept of 'ubuntu' traditionally runs counter to the creed of individualism of Western societies, it is clear that the African legal theory is also feeding into the mainstream Western legal theory through concepts such as 'ubuntu.' For example, in the context of United States foreign policy, Bagley (2009) alluded to the concept of 'ubuntu', stating: '[i]n understanding the responsibilities that come with our interconnectedness, we realize that we must rely on each other to lift our World from where it is now to where we want it to be in our lifetime, while casting aside our worn out preconceptions, and our outdated modes of statecraft'. A more candid articulation of 'ubuntu' is international treaty law is the first recital in the Rome statute of the international criminal court of 2002, which states that: 'Conscious that all peoples are united by common bonds, their cultures pieced together in a shared heritage, and concerned that this delicate mosaic may be shattered at anytime'.

More so, 'ubuntu' has traits in principles such as 'humane treatment' in international humanitarian law, or 'mitigation' in criminal law,' 'fair trading practices' in international trade, among others. Examining the reasoning of the ICJ in the *Nuclear Weapons* Advisor Opinion, it is possible to argue that in terms of 'ubuntu' philosophy, the answer to the question of the legality of nuclear weapons is not difficult to find, especially in light of the prohibition of indiscriminate weapons in international humanitarian law.

4.4.7 Brother's Keepers: Societas Humana

The then Secretary-General of the Organization of African Unity (OAU), Salim Ahmed Salim, stated that every African is his brother's keeper, based on the idiom in most African cultures that 'you do not fold your hands and just look on when your neighbour's house is on fire'. This was in response to the accusation of African leaders by the Ugandan President, Yoweli Museveni, that the leaders were condoning the wholesale massacre of Ugandans by Idi Amin under the guise of non-intervention because it was an internal affair of Uganda. President Museveni stated that:

> Over a period of 20 years three quarters of a million Ugandans perished at the hands of governments that should have protected their lives […] Ugandans felt a deep sense of betrayal that most of Africa kept silent […] the reason for not condemning such massive crimes had supposedly been a desire not to interfere in the internal affairs of a Member State, in accordance with the Charters of the OAU and the [UN]. We do not accept this reasoning because in the same organs there are explicit laws that enunciate the sanctity and inviolability of human life.[3]

[2] Confirmed by Particia Achani and Christopher Mabazira in an interview with the author at the Centre for Human Rights Pretoria on 9 May 2012 and 10 May 2012, respectively.

[3] President Museveni of Uganda, in his maiden speech to the Ordinary Session of Heads of State and Government of the (OAU), 22nd Ordinary Session of the OAU Assembly of Heads of State and Government, Addis Ababa, Ethiopia, July 1986.

In response, Dr. Ahmed Salim stated that the non-intervention clause in the OAU Charter should not be taken to mean indifference. He contended that there was no clause in the OAU Charter that gave African governments the licence to slaughter its citizens. Dr. Ahmed Salim reasoned thus:

> [The OAU] Charter was created to preserve the humanity, dignity, and the rights of the African. You cannot use a clause of the Charter to oppress the African and say that you are implementing the OAU Charter. What has happened is that people have interpreted the Charter as if to mean that what happens in the next house is not one's concern. This does not accord with the reality of the world.[4]

Consequently, Dr. Salim urged the OAU to play a leading role in transcending the traditional view of sovereignty, invoking African values of kinship and solidarity. He asserted that 'our borders are at best artificial', and that 'we in Africa need to use our own cultural and social relationships to interpret the principle of non-interference in such a way that we are enabled to apply it to our advantage in conflict prevention and resolution'.[5] Dr. Salim's reasoning helps to explain the incorporation of the right to intervene in the Constitutive Act of the African Union (AU) in 2000. The right to intervene in a member state of the AU is rooted in the same school of thought as the notion of 'responsibility to protect' (R2P) endorsed by the UN General Assembly in 2005 (Kuwali 2011). As the cosmopolitan concept of R2P emerged later the AU's right of intervention, R2P emanted 'quite literally, from the soil and soul of Africa' (Luck 2008, p. 1). The former South African President Thabo Mbeki (2003) eloquently expounded that:

> [B]ecause of our interdependence and indeed we share a common destiny, we have to agree that we cannot be ruled by a doctrine of absolute national sovereignty. We should not allow the fact of the independence of each one of our countries to turn us into spectators when crimes against the people are being omitted […] we will have to proceed from the position that we are each our brothers and sisters keeper.

The African ideology that 'every African is his brother's keeper', can also be juxtaposed with the natural law notion of *societas humana* – the universal community of mankind. In this connection, it can also be argued that the notion of universal jurisdiction is a derivative of the 'brother's keeper' ideology. This view lends credence from the *Zimbabwe Torture case* (*SALC and another* v. *National Director of Public Prosecutions and others* where the South African High Court who ruled that South Africa's legal system can be used to investigate and prosecute Zimbabwean officials suspected of crimes against humanity. According to Judge Hans Fabricius (2012, p. 54):

> The general South African public, who deserved to be served by a public administration that abides by its national and international obligations. It was also in the public interest that South Africa comports itself in a manner befitting this countries' status as a responsible member of the international community, and this would be done by seeking to hold accountable those responsible for crimes that shock the conscience of all human kind. By initiating an investigation into the allegations of torture the Respondents could ensure that the

[4] Quoted in Bah (2005), p. 41.

[5] *See* 'Proposals for OAU Mechanisms for Conflict Prevention and Resolution,' Report of the Secretary General on Conflicts in Africa, CM/1710(L.VI), Organization of African Unity, Addis Ababa, 1992, p. 12.

> individual obligations were met in this regard. The decision not to do so is effectively a shirking of these responsibilities, and therefore is of concern to the South African public. The public clearly has an interest to the manner in which public officials discharge their duties under this legislation.

What Justice Fabricus is saying is that as a responsible member of *society humana,* South Africa cannot turn a blind eye to mass atrocity crimes in a neighbouring country where the victims are not protected. This argument is augmented by Hugo Grotius – the father of international law – who stated that 'kings, and those who possess rights equal to those kings, have the right of demanding punishments not only on account of injuries committed against themselves or their subjects, but also on account of injuries which do not directly affect them but excessively violate the law of nature or of nations in regard of any person whatsoever' (Grotius 1925, pp. 472–473). This thesis extrapolates the theory of the 'right of humanitarian intervention' in international law in the responsibilities of sovereignty makes them their 'brother's keeper' (Geldenhuys 2006, p. 2).

4.4.8 Consensus Decision-Making

The golden thread in most treaties on the African continent is the provision of making decisions by consensus. For example, under Article 7 of the AU Constitutive Act, the Assembly of Heads of State and Government are obliged to 'take its decisions by consensus, failing which by two-thirds majority'. Consensus decision-making is a group decision making process that seeks the consent, not necessarily the agreement of participants and the resolution of objections. Allen (1989, p. 157) defines 'consensus' as agreement in opinion; majority view. Consensus can be viewed as, first, general agreement, and second, group solidarity of belief or sentiment (Merriam-Webster 2012). The word consensus is used to describe both the decision and the process of reaching a decision. In African societies, consensus decision-making is thus concerned with the process of reaching a consensus decision, and the social and political effects of using this process.

In traditional African settings, members, especially the elderly, usually engage in 'brainstorming' sessions to solve a problem, make a majority opinion, reach a general agreement or concord. Consensus is usually regarded as the best method to achieve communal goals. Consensus does not necessarily mean unanimity, which – although an ideal result – is not always achievable; nor is it the result of a vote. By doing so, decision-making involves an effort to incorporate all legitimate concerns, while respecting societal norms. What distinguishes consensus decision-making in African societies from other types of group activity is the absence of criticism and negative feedback. If people were worried that their ideas might be ridiculed by the group, the process would fail (Lehrer 2012, p. 22). It can be argued that the consensus decision-making process has given rise to the provisions of consensus in modern international legal instruments. Further, the concepts such as the 'Panel of the Wise', 'Eminent Personalities' and 'Council of Elders; derive from the traditional African decision-making processes and legal doctrines.

4.5 Conclusion

Colonization of African countries by the Europeans did not necessarily destroy the indigenous customs and system of law in Africa but rather obscured these native systems (Roberts and Mann 1991, p. 8). Colonial laws were uprooted in the West and transplanted to the rest. Certainly colonialism transformed the law in the colony and also impacted the relationship between law and morality (Williams and Moses 2008, p. 158). However, there is a lacuna in literature on the effect of colonialism on indigenous African theories of law and customs. It is not farfetched to perceive that the transplanted Western laws were not affected by indigenous African legal theories. As a result of this cross-fertilization of legal systems, the legal theories have been intricately intertwined leaving the hegemonic Western theories to be outstanding. Mainstream legal theories have been outstanding because they have been the focus of Western anthropologists and legal scholars; whereas indigenous African theories were not recorded but instead preserved in proverbs and other oral traditions.

The mere fact that indigenous African customs and laws are not prescribed in the Western sense does not negate their normative value, especially where there exist 'sincere and deeply held expectations of compliance' by the society (Sheldo 2008, p. 22). Such customary norms have proven in several instances to be equally effective as law – properly so called – to address social problems. Granted, African legal thought inclines to natural law whose validity has been doubted because it is highly subjective and contains contradictory concepts. However, principles such as the Martens Clause establishes an objective means of determining natural law. It permits notions of natural law to influence the development of the laws of armed conflict (Ticehurst 1997). In order to decode an African legal theory from the various cultures amongst various societies in Africa, one should focus at the striking uniformity of the practices, values and principles about which there is widespread agreement in the society (Oladosu 2001, p. 24).

The African legal theory has been rendered weak and subjected to hegemonic notions of the Westphalian system (Rajagopal 2006, p. 780). Nonetheless, it is possible to decipher Afrocentric legal theory from the hegemonic legal theory and decode the African contributions to hegemonic legal theory (Rajagopal 1998–1999, 2006). The starting point is to excavate the legal systems and practices of indigenous African societies and salvage legal theories and doctrines employed (Oladosu 2001, p. 15). Many scholars of African law agree that law 'cuts across the totality of the facet of the life of Africans and thus juristic thought is embedded in their social relations of the people as obtainable in the society or community' (Ayinla 2002, p. 167).

Even in pre-Colonial period Africans had set down system for administration of justice in their various localities or communities. Although, the indigenous systems were not as sophisticated as under the Westphalian system, it was designed to ensure stability of society and maintenance of the social equilibrium. The most important objective was to promote communal welfare by reconciling the divergent interests of different people (Tobi 1996, p. 1). In Africa, law is an integral part of culture,

seen as an instrument of maintaining social equilibrium with emphasis placed on distributive justice rather that formal justice (Ayinla 2002, p. 147). Ayinla (2002, p. 153) rightly writes that:

> The varied laws and procedure as well as the distinction between civil and criminal law have grown up with the European culture with nothing in common with African cultures. The principles are alien both in growth and sentiment thus cannot be used to explain the bases of primitive legal theory for it will be fallacious to do so.

African societies are based on a collectivist organization while Western traditions tend to be individualistic (Ayinla 2002, p. 153). In an African setting, legal personality is so broad enough that interdependence among the people had imposed collection responsibility on the whole family. The rationale behind this collective responsibility is to ensure a continuous harmonious relationship among the entire members of the community as a corporate whole (Williams and Moses 2008, p. 160).

There are several doctrines that have veritable and pertinent characteristics of indigenous African juristic thought, whose hall mark is reconciliation and restorative – rather than retributive – justice (Williams 2006, p. 45). Further, the non-litigious approach to conflict resolution through mediation, conciliation, arbitration and negotiation is an African heritage in matters of law and justice which must be credited to African legal system (Ayinla 2002, p. 160). It is easy to notice Africanness in the concepts of human dignity and human rights.

The concept of 'ubuntu' is also another philosophy with African roots spreading over to Western theories. For instance, the 'ubuntu' philosophy is embedded in the principle of 'humane treatment' in international humanitarian law, particularly the 'Martens Clause,' which provides authority for looking beyond treaty law and custom to consider principles of humanity and the dictates of the public conscience, when determining the full extent of the laws of armed conflict (Ticehurst 1997). It is possible to argue that the 'ubuntu' philosophy can help address the so called *non-liquet* emanating from the indecision of the ICJ in the *Nuclear Weapons* Advisory Opinion. Other doctrines with characteristics of 'ubuntu' include 'mitigation' in criminal law, 'fair trading practices' in international trade, among others.

Another clear example of African jurisprudence is the traditional consensus decision-making process in African communities whose derivatives are concepts such as the 'Panel of the Wise', 'Eminent Personalities' and 'Council of Elders'. The principle of universal juridiction is also a derivative of the concept of brother's keepers where in *society humana,* one country has the obligation to demand punishment for pertrators of crimes against humanity in another country as noted in the *Zimbabwe Torture* case. The cosmopolitan notion of 'responsibility to protect' is also linked to the right of intervention under the AU Constitute Act, which is traced from the African ideology of bother's keepers. In view of this rich jurisprudence, Africa should not be perceived as a recipient of, but rather an equal contributor to, the development of legal theory. As an actor on the international scene, the important role of the Africa and African legal scholars in advancing legal theory should not be ignored (Maluwa 2000, p. 201; Muntharika 1995, p. 1706).

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