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Multiculturalism, Legal Pluralism and the Separability Thesis: A Postmodern Critique of 'An African Case for Legal Positivism'

Idowu William & Moses Oke
Dept. of Philosophy
Obafemi Awolowo University
Ile-Ife
idwilly@yahoo.com
rosenhillme@yahoo.co.uk

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Abstract

In what ways can it be said that legal positivism is suitable for African legal systems? What, actually, are the limits of legal positivism with respect to the dynamics of plurality of laws and legal structures in African society? What is the implication, for legal positivism, where individuals and groups in nation-states in Africa tend to give primacy to laws, legal structures and systems that tend to conflict with state laws, legal structures and systems? Addressing these questions the paper is a critical assessment of the theses that advocate the adoption of legal positivism for African legal systems. Challenging this position Idowu and Oke interrogate whether there is a necessary connection between multiculturalism and pluralism on one hand and the subscription to the legal positivist jurisprudence of 'separability' on the other? Citing the failure of proponents of the legal positivist thesis to adequately answer the multicultural question "how does legal positivism create norms and standards that are indeed suitable and appropriate for all cultures?" the paper undertakes, in the African context, a postmodern critique of this problematic relationship between these concepts.

Keywords:

Legal Pluralism; Legal Positivism; Multiculturalism; Separability Thesis

1. Introduction: Understanding the Debate

The debate over the nature and possibility of African jurisprudence, from a historical perspective, is a chequered one. That history, in certain terms, is reminiscent of the then, but no longer, controversial debate over the possibility of an African philosophy.[1] Evidently, the possibility of both jurisprudence and philosophy in Africa, sharing the view of Nkiriuka, centres primarily on the definition of the African self, its distinct features and the understanding of that self in the light of its intellectual components.[2] In her words, inquiries that explore African philosophy or African legal theory are "attempts to arrive at some sense of identity after colonialism."[3]

Perspicuously, it follows that several attempts at pontificating what the nature of African jurisprudence or legal theory is, interpreting the mindset of Nkiriuka, belongs to what may be generally called postcolonial theory formation.[4] As a matter of fact, African postcolonial discourses, even though few in the area of legal theory, generally consist of questioning the legitimacy of the impression and content of imperial thought and its fascinating impact on the direction of living reality amongst the colonised.

This, in a very relevant sense, not only explains the nature of thoughts on the possibility of African legal theory but equally explains why there is a gap in the literature on African legal theory. For Okafor, what was actually wrong with legal thought in Africa was that while practice actually existed, theory was inadvertently missing. Africans had laws, practiced laws, so to say, but never had a theoretical understanding of the sophisticated sets of laws that were in practice. His basic justification for this view, influenced by Sir James Marshall,[5] consisted in what he regarded as the absence of codified rules of law, given that it was not until the late 1960s that the articulation of the ideas that are embodied in the various African practices and patterns of life took off with the publication of *Bantu Philosophy*.[6]

Retrospectively, four distinct stages are discernible in the historical quest for this aspect of the African philosophy of society. In the first instance, there are those who contend that there is no such thing as African jurisprudence or legal theory.[7] This may be termed the sceptical school. The contents and constituents of that scepticism have, of course, by now been transcended. The influence and legacy of colonialism in the framing of that assertion cannot be overemphasised. This brand of scepticism may have formed one of the several reasons why the 37th Volume, the 2006 edition, of the *Cambrian Law Review* was devoted to exploring the possibility of African legal theory.

Secondly, there are scholars who are of the opinion that what represents the heart of African jurisprudence is indiscernible but at best represents a combination of customs and conventions which are clearly below the level of critical ratiocination.[8] This school may, for the purpose of neat classification, be referred to as proponents of ethno-jurisprudence in Africa. The impression here is that what may be said to be paraded in the annals of the history of Africa in terms of representations, categorisation of laws and the principles that underlie it are nothing but ethno cultural, religious and moral ideas. For this group, it is no wonder that morality or moral rules are the basic regulative stuff on which lives are administered, governed and, altogether, directed in most African communities. Given the frame of ethno-jurisprudence existent in such societies, it is not a misnomer to interpret such a society as what Hart reputedly regarded as "a pre-legal society"[9] in which rules of citizen-obligation are entirely moral in nature.
In the third place, there are those who attempt interpreting the nuances of African realities in light of existing thoughts and trends in mainstream, western jurisprudence.[10] For want of a better name, this school can be categorised as the Universalists with the supreme contention that jurisprudence is the same globally and in the universal sense. It posits that there are no cultural interventions and entries in the nature and consideration of jurisprudence. Theories and concepts are formed from a general, universal experience and any claim to cultural uniqueness distorts the essential character of that conceptual attribute. This group concludes that any culture whose legal frame does not conform to that general attribute is less deserving of the name jurisprudence.

The opinion of the fourth group of scholars and thinkers on the nature of African jurisprudence is of particular interest. For this group, there exists an African jurisprudence i.e. a set of ideas about, concerning and around law which is basically developed from experiences peculiar to Africa.[11] Even though controversies abound among these scholars over what is exactly meant by 'experiences peculiar to Africa', it is believed that those controversies centre on different interpretations of what is implied when the African worldview is subjected to critical analysis. This group may be called proponents of the possibility and actuality of African legal theory - alternatively it will not be out of place to tag this school of thought as both optimists and culturalists. Reading Nkiriuka's paper, one is inclined to brand her as an

African Cultural Optimist. For her, "to think of the concept of law as anything other than universal is to misunderstand its nature. However, our argument is not that the concept of law itself is particularist but that it is subject to particularist characterisations and the characterisations that we currently have are fundamentally Western and do not represent the whole of the socio-cultural experiences of Africans."[12] In focusing on the problem of legal pluralism in nation-states of Africa, the concern of this paper is critically located within the third perspective, the Universalist school: those who attempt to give an intellectual representation of African jurisprudence by interpreting its nuances and nature in the light of existing conceptual prisms and trends in mainstream jurisprudence. These scholars are of the view that African Jurisprudence is not too different from mainstream Western Jurisprudence, hence the question whether there exists a separate sphere of thinking of legal theorisation called 'African Jurisprudence' appears unnecessary and pointless. The grand objective of this third position has always been to interpret and apply the nuances of schools of thought in mainstream jurisprudence such as positivism, naturalism, postmodernism, realism etc as not only reflective of Anglo-Saxon jurisprudence but also reflective of African philosophy of society and the African legal tradition.

More precisely, within this tradition can be discerned the attempt to make a case for the adoption of legal positivism as a legal doctrine, ideology and framework for Africa's fledgling legal systems. Legal positivism and the endorsement of the Separability thesis - i.e. the separation, conceptually, between law and morality - is perhaps the best antidote to the fledgling nature of African legal systems considered from the point of view of multiculturalism and pluralism. From this perspective, nations-states in Africa, by adopting legal Positivists' Separability thesis as the philosophical, ideological and jurisprudential basis of law despite the plurality of customary laws that exist within the state, practically, are stemming the tide of pluralism.

The dilemma inherent in legal pluralism has to do with the attitude of individuals and groups in these cultural normative spaces in relation to legal systems sanctioned by the state. This dilemma creates complex challenges that demand a better understanding not only of the normative social spaces or legal orders themselves but also of how individuals and sub-groups inhabit and navigate through them. More than this, however, what is inviting for serious critical scrutiny is the philosophical justification and basis for managing the complex challenges and the dilemma they pose for the African legal system. This, among others, is the concern of this paper.

The question is in what ways can it be said that legal positivism is suitable for African legal systems? What, actually, are the limits of legal positivism with respect to the dynamics of plurality of laws and legal structures in African society? What is the implication, for legal positivism, where individuals and groups in nation-states in Africa tend to give primacy to laws, legal structures and systems that tend to conflict with state laws, legal structures and systems? In articles published in the *International Philosophical Quarterly* in the mid-eighties, Okafor, Taiwo and Nwakeze all contended that legal positivism is a bad legal theory for African legal system. Against this view, Jare Oladosu, in a thought provoking paper, contended that the premises and arguments of these scholars were flawed, claiming instead that an African case can be made for the adoption of legal positivism on cultural grounds, that is, bearing in mind the multicultural and pluri-ethnic nature of African societies and countries.[13]

Reflecting a strong appeal to the fact of multiculturalism in Africa, the importance of that paper consists in what the author considers to be the merit of legal positivism in the face of the heterogeneity, pluralism and multiculturalism of the African continent. The beauty of legal positivism for Africa, the reasoning goes, consists in the fact that it alone subscribes to the thesis that law and morality be separated conceptually which is what African legal systems actually need.

The present paper is a critical assessment of the ground or advocating the adoption of legal positivism for African legal systems. The assumption in Oladosu's paper is that pluralism is an inherently problematic phenomenon. Such an assumption is wrong inasmuch as there is no proof to show that pluralism is a dangerous and problematic phenomenon. The questions of relative importance to this task are: is there a necessary connection between multiculturalism and pluralism on one hand and the subscription to the "jurisprudence of Separability" on the other? Does multiculturalism and pluralism necessitate the jurisprudence of Separability? What is the position of the Separability thesis in relation to the idea of legal pluralism?

The argument of this paper consists in the view that inasmuch as the popularity and merit of legal positivism and its Separability thesis is obvious to its proponent and, perhaps, its opponents, its supposed

merit for the African continent in the context of multiculturalism and pluralism is self defeating because it still fails to answer the question of how does legal positivism create norms and standards that are suitable and appropriate for all cultures. It is concluded that the Separability thesis, as advanced by Oladosu, constitutes an underestimation of the beauty and positive challenges of pluralism including, and especially, legal ones. At best, it may be regarded as an escapist agenda or solution. It does not actually solve the many challenges posed by pluralism. It is contended that even if pluralism is a gravely problematic phenomenon, the Separability thesis is not and cannot be a solution to the problem since the problem is not actually adequately conceptualised. In the end, the paper posits that the concern of the author represents a projection of what Peter Fitzpatrick calls one of the "myths of modernity", or an inclination towards what one might call legal monocentricity. This is the basis for a postmodernist assessment of legal positivism, Separability thesis and African legal systems.

For proper understanding of the concerns and the arguments of the paper, the paper shall be divided into four sections. The first consists in conceptualising legal pluralism. The second section consists in understanding the philosophical and intellectual background to the suggestion of legal positivism for Africa's fledgling legal systems. The third consist in the content and substance of the case for legal positivism for African legal systems. The fourth section shall be devoted to a postmodernist critique of the suggestion of legal positivism for Africa and the conclusion of the essay.

2. Conceptualising Legal Pluralism

In a general sense, the perception about legal pluralism is that legal pluralism seeks to project law as an entirely complex phenomena or institution, or what Simon Roberts could be said to have branded as "irresponsibly broadening the concept of law."[14] This observation is true but only in a partial sense. How? Law, indeed, could be seen as a complex phenomenon inasmuch as it is true that, in jurisprudential circles, the definition, discussion and perception of law has been pertinently partial, worrisome and wearisome. This is why Hart, for instance, believes that the question 'what is Law' is perhaps the most difficult question ever asked in the history of human society. In the words of Hart, "No vast literature is dedicated to answering the questions 'what is chemistry?' or 'what is medicine?' as it is to the question 'what is law?'" For Hart, therefore, the question of what law is constitutes one of the perplexities of legal theory.[15]

The conceptual problems involved in this seemingly simple question provide the basis and the format for articulating and discussing the various divergent opinions on the subject matter of jurisprudence. Pospisil even acknowledged that the term 'law' is only applied to a construct of the human mind given that it does not exist in the actual world.[16] Regrettably, the concept of legal pluralism has added to the list of the perplexities of jurisprudence. The exact nature of the worry, according to Benda-Beckmann, is the unwillingness "to admit the *theoretical possibility* of more than one legal order or mechanism within one socio-political space, based on different sources of ultimate validity and maintained by forms of organization other than the state".[17]

But then, it is not entirely true that legal pluralism projects a complex notion of law in that the complexity is dulled by the fact that legal officers and officials, in their everyday actions seem confident about what it is they are out to enforce. The implication is that there is a wide gulf between the world of practice and the world of concepts and theory. But then, law is both a practical institution as well as a conceptual phenomenon. The beauty of the debates on legal pluralism, however, is anchored on a central concern which jurisprudence and the law has not taken time to consider, which is that, 'every society is legally plural, whether or not it has a colonised past.'[18]

Debates on legal pluralism are thus a challenge and revolt against the heartbeat of modern jurisprudence (especially as evinced in the debates and controversies between the naturalists and the positivists over the nature of law). The core of modern jurisprudence can be said to be a *redivivus* of the Cartesian quest which denies and is oblivious of the plurality in which the world and its epistemology is ensconced.

Lamentably, however, despite the challenges that discussions on legal pluralism pose to modern jurisprudence and modern jurisprudence's obsession with the Cartesian quest, what is conceptually rendered as legal pluralism is itself inundated and enervated by lingering concerns over its conceptual characterisations. For example, in his conceptual elaboration on the basic meaning of the term legal

pluralism, John Griffiths[19] noted that his account of legal pluralism is a descriptive rather than a conceptual one. The problem with that move could be its inherent limitation in the sense that such a characterisation may not be all-embracing meaning that it could descend to the level of a particularistic understanding of what pluralism, in the legal sense, means. Nevertheless, the beauty of Griffiths' descriptive conception is that it purports to be a reaction and challenge against what he himself called "the ideology of legal centralism"[20], what we have, in our modest understanding, conveniently tagged the "ideology of monocentric jurisprudence." As defined by Griffiths, legal centralism is an *a priori* assumption about the way the legal world ought to be, should be and in fact is. What legal centralism denies, according to Griffiths, is the existence of a competitively normative order with the institution of the state. That is why it sees law as nothing but the law of the state. Legal centralism, in his words, is the view that:

> *"Law is and should be the law of the state, uniform for all persons, exclusive of all other laws, and administered by a single set of state institutions. To the extent that other, lesser normative orderings, such as the church, family, the voluntary associations and the economic organisations exist, they ought to be and in fact are hierarchically subordinate to the law and institution of the state."*[21]

Clearly, for Griffiths, legal pluralism is doomed to eternal irrelevance and its factual status reduced to a moribund legacy if, indeed, legal centralism is true. Centralism, given its scope and sway, immediately establishes and rekindles the very concern that has brought modern philosophy, precisely, epistemology to a dead-end. But in what sense can we say that centralism is true, that law is actually what proceeds from the state, that other normative spaces are secondary or irrelevant? There is no other way of characterising centralism's assumption of a supreme claim to normative ordering in human society other than what has been said earlier. That is the view that the state's normative base is not consensus, not based on consent but a historical recourse to force with repeated rediscovery of its magnitude of right but which is no longer consistent with living reality.[22] In other words, to hold the assumption that only state laws are primarily and normatively obligatory is to hold an incorrect assumption about the existential condition of man in this twenty-first century. *Igba ti yi pada* (times have changed) says a popular adage among the Yoruba people of south-western Nigeria. It is in this sense that we must understand Griffiths' conclusion that legal centralism is at best an ideal, an illusion, a myth, less euphemistically, a falsehood.[23] What is true of the world is that it is plural in nature. The plural nature of the world endorses the view that "law in modem society is plural rather than monolithic, that it is private as well as public in character, and that the national (public, official) legal system is often a secondary rather than a primary locus of regulation".[24]

To buttress the dynamic nature of the concept, Griffiths further distinguished between what he calls 'weak legal pluralism' and 'strong legal pluralism'[25] a move shared, though in a different sense, by Sally Engle when she eloquently distinguished between 'classic legal pluralism' and 'new legal pluralism'.[26] While not completely out of place, such classifications are, at best, an attempt to multiply entities unnecessarily especially where the concept that is to be qualified is still conceptually controversial.

In ostensive terms, legal pluralism is illustratively defined where it is possible to point to the existence of myriads of laws such as official law, state law, modern law, unofficial law, folk law, people's law, tribal law, indigenous law, non-state law, customary law, received law, imposed law, native law, transplanted law with each sense of law commanding adequate and meaningful attention within nations-states. Following this ostensive definition, we may have to agree with Moore that law, from the perspective of legal pluralism, is understood very broadly as cognitive and normative orders generated and maintained in a social field such as a village, an ethnic community, an association, or a state.[27] Many states in Africa, including the Nigeria that we are aware of, represents and captures the essence of what such a cognitive and normative order is.

However, theoretically, legal pluralism is at first hand defined and characterised to mean the complexity of law in the light of modern realities. These modern realities involve the interplay of many factors: colonialism, imperialism, globalisation, ICT-induced revolution and migration being very worthy examples. While the complexity is realised as a veritable component of the characterisation of law, it does not in any way suggest abstraction around the concept of law. Law may be said to be plural in nature, in dimension and in context but then it is not the same as saying that law is an abstract concept. What may lead one to regard law as plural are not exactly the same sets of ideas that oblige one to regard it as abstract. Legal pluralism conceives of law, at least from this point of view, as an institution with

consequences in human society. Its focus of meaning straddles spaces of normativity in human relations to the more practical and applied realm of legal understanding. This movement is what Sally Engle Merry poetically described as an "intellectual odyssey"[28] involving the history and progress of nations and societies from the remotest idea of human social organisation to the most complex.

Unfortunately, anti-pluralists perceive pluralism as a return to barbarism or the nationalistic and tribal stupor which dwindled the glory of communities in the past, a task which modern states now evoke and project. What states, in the modern era, are seeking to do is to, if possible, eradicate differences. The present age of globalisation, the restructuring of global capitalism, the dominant role of international financial institutions, transnational corporations, technological and informational revolution, is a dramatic one, a drama which is centred on the reduction of the human globe to a global village. To advocate plurality is to sound non-conformist in a world reverberating under the influence of the future possibility of a single World Order. The anti-pluralist, from the perspective of globalisation, posits that a bifurcation or creation of a dichotomy in the way nation-states live their lives, is a way of not just splintering progress but obfuscating our understanding of history. For them, globalisation has afforded the world a means of eroding and eliminating differences which have all along been inimical to the transformation of what Tade Akin Aina calls the "transformation of the relation between states" and "the universalization of certain practices."[29]

The pro-pluralists are of the view that pluralism is the best model for enhancing the return of the citizen[30] back to the life and essence of activity which had always been crippled by the Hobbesian invention of the 'new leviathan', that is, the modern state and its glowing aura of magisterial omnipotence. Most post-modernists, or pragmatists as Richard Rorty[31] prefers to call them, see pluralism as the best interpretation of the conditions of the world. As Rorty puts it, objectivity and universality are enemies of plurality; in its place, solidarity should take over.[32]

The reflection above over the respective position of the anti-pluralist and pro-pluralist has been applied to the lingering dilemma over legal pluralism. In their reflection over the dilemma of legal pluralism in India, Eberhard and Gupta[33] seem to share the opinion of the pro-pluralist. For them, modern states have always been the harbinger of the dilemma of pluralism in contemporary societies. Modern States, just like the colonial state, by ordinance and force, often seek to destroy the plural order by resort to some ideology of a curious sort. Their reflection on the nature of the dilemma of legal pluralism is penetrating. According to them,

> *"Indeed, modern law is characterized by general and impersonal rules to be imposed in a uniform way by an external authority, the state, which holds the monopoly of legitimate violence. For a long time the modern project of the rationalization of society's organization via state law and the walk towards uniformity, usually presented as a move towards universality, has been equated to civilization whereas pluralism was interpreted as a sign of allegedly 'primitive' societies."*[34]

From the point of view of what he described as critical legal pluralism, Roderick Macdonald[35] challenges the normative transnational context which defines legal pluralism as the simultaneous existence - within a single legal order - of different rules of law applying to identical situations[36] or the interaction of neatly defined official and unofficial normative orders in one social field. According to Macdonald, such normative orders grouped under one field are not stable, unambiguous, and self-contained regimes interacting along clear boundaries."[37]

Emphasising the notoriety of the word "Legal pluralism", Étienne Le Roy,[38] from the perspective of French jurisprudence, posits that modern legal scholars should rather talk of "multilegalism." For him, laws' plural nature is not captured in the old label, since it is silent on the nature of law as a phenomenon. The label "legal pluralism" only emphasises the addition of laws rather than the nature of plurality that is in consonance with the nature of law. From a critical perspective, it appears that Le Roy is sounding too ideological or less euphemistically, too abstract. The word "multilegalism" does not appear to say more or less than the phrase "legal pluralism".

As a matter of fact, Le Roy's 'multilegalism' does not seem to vitiate, in our estimation, the sense and meaning conveyed by the word 'legal pluralism'. Law may not, in fact, be seen as ensconced in plurality phenomenally but in the fact that it is replicated in the existence of spaces of normativity

which compels us to assert the plurality in terms of those spaces rather than ascribing that pluralism or multilegalism to law as an essence or reality. Indeed, if we take to Le Roy's conception, it is very likely that the science of the nature of law with respect to the debate on pluralism will be found multiplying entities unnecessarily. What is needed is a theoretical blueprint that intestinally defines the nature of law in the light of the understanding of modern complexities and realities and that creates space for normative contestations but which dynamically challenges the sensitivities encoded in citizenship obligations. In other words, what is required is not debates or controversies over words nor choice of words but understanding the dilemma citizens in nations-states are exposed to in the face of competing sources of obligation.

This aspect of legal pluralism, no doubt, is important for citizenship in nations-states of the world. This shall be buttressed as we go along. But, also, this makes nations-states one of the most challenging political arenas for the realisation of the challenges involved in the idea of pluralism particularly in the area of jurisprudence.

From the above, it seems that legal pluralism, as a reality of our modern times, naturally is in consonance with the idea of nations-states. But then what is meant by nations-states? Throughout this article, emphasis has been on nations-states rather than nation-states. From this point on, it is necessary to have some conceptual clarification of the notion of nations-states and nation-state since many ideas seems to be bandied about concerning those concepts. If we are to understand the dynamics of legal pluralism in nation-states, it behoves us to unravel what is actually meant by nation-states since, by doing this, we shall end up understanding better in what ways legal pluralism poses a huge challenge for nation-states.

There are conceptual confusions over concepts such as nation, nation-states and nations-states. Sometime, or even many times, nation-states is taken to be synonymous with nations-states. But then, there is a world of difference between those two concepts. However, to understand the difference(s) we need to pay attention to the root word which is nation. As an ethno-cultural community, a nation, etymologically, means a birth group or a blood-related group. According to G. W. Herder,

> Nothing therefore is more manifestly contrary to the purpose of political government than the unnatural enlargement of states, the wild mixing of various races and nationalities under one sceptre…such states are but patched up contraptions, fragile machines, for they are wholly devoid of inner life.[39]

Based on this original meaning, that is, as an ethno-cultural community, the word 'nation' has come to attract different meanings. In one instance, the word 'nation', as argued by Gyekye has come to stand for "a group or community of people who not only share a common culture, language, history, and possibly a territory but believe that they hail from a common ancestral background and are therefore closely related by kinship ties."[40] Viewed from this perspective, it seems that ethnicity is the most important crucible of a nation. However, according to Vilfredo Pareto, ethnicity is one of the vaguest terms known to sociology.[41] It may also be regarded as a complex and controversial concept[42] especially in terms of definition, scope, relevance and, precisely, its limit in the analysis of the structure and nature of political societies in the modern world, especially, Africa.

Given these hordes of controversies on the nature ethnicity and, importantly, given the linkage between ethnicity and a nation, one could say that a *nation* is a social concept rather than a political concept. Nation, in this sense, is only a social entity. However, it is possible for a nation, in this sense, to develop into a state. According to Gyekye, this ethno-cultural community can evolve into a state if it "acquires the relevant appurtenances of statehood."[43] This introduces the second meaning of a nation as one that has evolved to be a politically sovereign state having acquired the appropriate paraphernalia of statehood.

In this sense, a nation is no longer a social concept but a political concept. There is a transformation or metamorphosis from its social milieu into a political entity. The meaning is that though it was formerly a natural birth group, transformation in its political life has made it acquire the essence of statehood. As a sovereign state, *nation* in this sense possesses the inherent qualities and virtues of nation in the first sense (the nation-state). Loyalty, civic-mindedness, commitment, linguistic homogeneity can be found to characterise this sort of union.

In the third sense, some very zealous African scholars[44] use the word nation interchangeably with the word state. Prompted, perhaps, by a sense of nationalistic optimism, a state such as Nigeria or Kenya, in their estimation, can be regarded as a nation even though it is a state. What they often mean, even though

wrong, is that a nation can be seen as a multinational state of ethnically and culturally complex and plural political communities; such a state consists of nationalities that were hitherto an ethno-cultural community. This third understanding of a nation as a multinational state means that though it is a state, it nevertheless, consists of many ethnic groups, many nations hence its multiethnic, multinational character. Such a multiethnic state as this, it is often believed, becomes predisposed to some problems which the concept of a nation in the first and second senses could not be said to have.

It is within the understanding of this third meaning that the concept of legal pluralism makes sense and perhaps, importantly, poses a world of daunting challenges. When a case is made for Positivists' Separability thesis in Africa, owing to the complex nature of African societies, the picture of Africa that is conjured, in our estimation, is that of a nation in the third sense i.e. as a nations-state. From an empirical point of view, therefore, one of the daunting challenges confronting most African States is how to create or build a state that is politically independent but comprising many nations or ethnic groups. Legal pluralism is often suggested as one of the several means of assuaging the familiar crisis that often bedevils such plural and multiethnic societies.

However, our analysis reveals that there is a distinction to be made between nation-state and multinational state. A multinational state clearly is a nations-state; one comprising a whole set of ethnically disparate segments with distinctive characterisation in terms of culture, language, values etc. This, however, is different from a nation-state. A nation-state is one that is primarily a nation in the first sense but that, in addition, has acquired the relevant machinery of statehood to evolve into the second conception. In other words, it has evolved from a mere social concept or phenomenon to a political one. It possesses the characters of statehood. In the words of Gyekye:

> *"A political community with a culturally homogenous citizenry and sovereign power concentrated at the centre to which all the citizens are subject and owe loyalty will be a nation-state. This in fact is the most appropriate meaning of the political concept of nation-state: a nation, that is, an ethno-cultural community that has evolved into a state, having acquired the relevant appurtenances of statehood."*[45]

In evidential terms, most African states are to be classified as nations-state in the sense that it is a state that combines many nations together in a single and bounded territory. Thus, in considering legal pluralism within the nation state, what is actually at stake is a consideration of the implication of law's plural nature and dimension within nations-states. The dynamics of legal pluralism, in whichever way it is viewed, is an offshoot of ethnic nationalism in nations-state' agenda in the Third World. If at all it is viewed as inherently problematic, it is not likely to be a problem in a nation or in a nation-state.

Granted the postulate that a nation in the first and second senses do not exist in today's society, they, perhaps, could have been products of the past but, then, what is immediately important in guiding our enquiry altogether is its conceptual possibility. Such conceptual possibility lends credence to the value of the philosophical enterprise one which is apparently concerned with, in the opinion of Bertrand Russell, uncertain, vague issues, innocent but useless trifling, hair-splitting distinctions, and controversies on matters concerning which knowledge is impossible.[46]

As hinted earlier, this aspect of legal pluralism fosters a significant discussion on the notion of citizenship in nations-states as understood above. According to Brubaker, debates about citizenship, in the age of the nation-state (understood as nations-states), are debates about nationhood – about what it means, and what it ought to mean, to belong to a nation-state. One such characteristic norm of citizenship in nation-state is the idea of egalitarianism. As adapted from Brubaker's analysis, it is contended that legal pluralism is an attempt to spread the conceptual meaning of egalitarianism to reflect citizenship expectation within nations-states.[47] To attempt to erode such pluralism is to stifle this conceptual understanding of egalitarianism in the area of jurisprudence. It is our conviction that pluralism endorses, in a greater deal, the egalitarian ideology inasmuch as it expresses, on one hand, and accommodates, on the other hand, our diversities. While it is true that legal centralism places everyone under a single spectrum, it, however, does not sympathise with our diversities. The background to the debate and various responses on legal monocentrism and polycentricism in Africa, viewed from the perspective of legal pluralism within the nations-state, constitute the remainder of the paper.

2.1 The Background

The background to an African case for the adoption of legal positivism for African legal systems dates back to the debate in the mid-eighties between Okafor,[48] Taiwo,[49] and Nwakeze,[50] over which of the theories in mainstream jurisprudence best applies to the African legal tradition. In other words, the African case for legal positivism can readily be situated in the outcome of that eventful debate. Okafor had contended that "the legal systems and institutions we inherited from our colonial masters are not altogether alien to the African legal tradition. But some of the principles and concepts on which some specific legal practices are based are entirely alien to the traditional African legal experience. One such principle or concept which is widely held in Anglo-Saxon jurisprudence is legal positivism."[51]

Having analysed the historically dismal performance of legal positivist theory, Okafor concludes, both from the ontological and moral points of view, that the African legal tradition is more at home with legal naturalism than with legal positivism. The justification for this consists in the fact that legal naturalism is "in accord with the traditional African legal phenomena"[52] or what one might describe as a shared sense of sympathy and sameness with some of the ideals that are characteristic of African social life and philosophy of society. In Okafor's words, "the African legal experience…is largely in conformity with that favoured by the natural law school…"[53]

The beauty of Okafor's analysis consists in the fact that it is an apt representation of African ontological experience and worldview and how that ontology translates in very lively and telling terms to every area of African life, including the legal. Apart from this, Okafor's submission is of compelling importance in describing what Africans think of the relation between normative categories and institutions existing within given cultures. However, what Okafor failed to do is to clearly define what the nature of African jurisprudence is and its conceptual connotations. It is believed that one can ferret the exact positions Africans jurists are likely to maintain on the relation between law and morality given that conceptual connotations. In unmistakable terms, Okafor only arrived at the conclusion that Africans see a close and necessary connection between law and morality on the basis of the kind of ontology that are found within their culture. It is not in every case that an ontological worldview supplies necessarily a conceptual understanding of law.

For our part, we argue that assuming that Africans hold on to the inseparability thesis, it is more convincing to derive such connection only on the basis of their conception or definition of law, and how morality can be seen to enter into that conception. Even though Okafor enumerated quite appreciably what Africans understand law to be, he, however, dwelt much on the sources rather than a consideration of what Africans admit law to be in its conceptual form. It is believed that only such kind of conceptual detail can provide the basis for assessing what African jurisprudence and its momentous contribution to jurisprudence at large can be. But then, analysis must go beyond this.

Taiwo's critique of Okafor's paper and conclusion is not centred on the fact that Okafor interpreted African legal tradition in legal naturalist terms nor that the African legal experience is antithetical to the principles of law as expressed in legal positivism. Taiwo does not see the flaw of legal positivism consisting in its unAfricanness, but in the fact that even if it is African, it is still a bad legal theory which must be rejected in as much as it provides a very easy way out for unimaginative judges who wish to dodge responsibility for their interpretations of the law.[54] But Taiwo's disenchantment with Okafor's paper consists in the fact that it elicits some of the troublesome aspects of African philosophy today that of reducing the African experience in ethics and particularly law to one single legal tradition. This reduction, for Taiwo, is a myth. In his words,

> *"…The 'African legal tradition,' the 'African,' etc., are all myths invented by their purveyors to camouflage the fact that they are shaping diverse African practices to fit their theories. On another level, these myths offer somewhat effective stratagems to evade taking responsibility for the often philosophically unsound melange their authors serve up as 'African philosophy.'"*[55]

Evidently, Taiwo's submission here has merit but that merit is a problematic one. According to Elias, [56] emerging facts borne out of anthropological researches contradict Taiwo's assumption. What Taiwo has succeeded in doing in his paper consists in the attempt to legitimise the view that African legal tradition is simply unlike the western jurisprudential tradition. What then does Taiwo mean by African philosophy, if notions of African legal tradition, African culture, African identity or African traditional values are self-defeating? Is our muted objection to the existence of African culture not given sociological and anthropological significance when the West solely describes the history of philosophy as uniquely that of the West and nothing else?

These and some other issues are the central concerns of Nwakeze's rejoinder to Taiwo. According to Nwakeze, the problem Taiwo has in understanding Okafor's paper is the failure to admit or understand the idea of conceptual dualism with respect to Okafor's use of the word African culture, values etc. In his words,

> *"A critical appraisal of Taiwo shows that he labours under two major problems, among others: one is conceptual/methodological; the other is substantive. The conceptual problem stems from his failure to distinguish between the use of "African Culture" in the generalised context and "African Cultures" in the specific sense. It is possible, and quite correct too, to talk of African culture, African legal tradition, African personality, African socialisation, norms and values, etc. so long as what is significantly common and fundamental to the cultures being examined is abstracted and emphasised."*[57]

3. The Case for Legal Positivism in Africa: Issues in Pluralism, Diversity and Multiculturalism

It is perceived that the intellectual groundwork on which Oladosu's case rests for the adoption of legal positivism for Africa derives from the unsatisfactory nature of both the ontological and moral arguments adopted by Okafor and Taiwo respectively. Since our interest is not in the plausibility of those arguments, we need not be detained by them. Of relevant interest, however, to his work is what he calls the underestimation, by these authors, of the potential difficulty inherent in multiculturalism and pluralism and the plausibility of the positivists' doctrine in assuaging the fundamental problems posed by those two fundamental characteristics of African states especially their legal systems. But then, we must understand legal positivism and its jurisprudence of Separability.

There are many ways in which legal positivism has been characterised. Many of such characterisations border on grave misunderstanding and confusion, according to Wilfrid Waluchow.[58] In the words of Hart, "the non-pejorative name 'legal positivism' like most terms which are used as missiles in intellectual battles, has come to stand for a baffling multitude of different sins."[59] Regardless of how legal positivism is defined, what is important here is our understanding of the Separability thesis and its significance for the idea of legal pluralism. We may end up observing that Oladosu's conception of the Separability thesis is, in the long run, a gross misrepresentation of positivists' thesis in its modern import and, thus, lacking the intellectual substance to carry through the cultural claims that are made for legal positivism. For him, all forms of definitions of legal positivism can or may be narrowed down to the Separability thesis. In his words,

> *"Let us take the Separability thesis as a 'negative' principle, it asserts what the law need not be. I suggest that we make this "negative" principle serve as the indispensable stump of the positivist account of the nature of law…A rich possibility exists for theorists to graft other logically compatible "positive" theses onto the Separability thesis, to derive yet other versions of legal positivism."*[60]

But then, whereas the positivists' view that laws are sourced in social facts seems less contentious, the Separability thesis, 'the indispensable stump of the positivist account of the nature of law,' using Oladosu's words, is about the most detested thesis by critics of positivism and, interestingly, the most controversial thesis that has divided the school of positivism. According to Hart, the Separability thesis is "the simple contention that it is in no sense a necessary truth that laws reproduce or satisfy certain demands of morality, though in fact they have often done so."[61]

Elsewhere Hart analyses the content of the Separability thesis into two disarmingly simple claims: "first, in the absence of an expressed constitutional or legal provision, it could not follow from the mere fact that a rule violated standards of morality that it was not a rule of law; and [second] conversely, it could not follow from the mere fact that a rule was morally desirable that it was a rule of law."[62] Clearly, Oladosu holds this doctrine as the most important contribution positivists have ever made to jurisprudence. But then, our emphasis here is that even those famous definitions provided by the influential Hart have been the subject of pertinent criticisms.[63]

As a matter of fact, the emergence of the distinction between exclusive and inclusive positivism,[64] an aspect of the growth of positivism which Jare Oladosu was silent about, has vitiated the force and vivacity of Hart's authoritative rendition of the Separability thesis. Indeed, arising from the division between exclusivist and inclusivist, there no longer exist just one thesis on the relation between law and morality but two: a Separability thesis and a separation thesis with both attracting different meanings.[65] What is more, even now, there have arisen many other theses within positivist tradition constituting solid and serious attempts to salvage positivists' Separability or separation theses from both internal and external discredit. Examples of these salvaging theories are the thesis of ethical positivism[66], fallibility thesis[67] and neutrality thesis.[68] Just what the thesis is that Oladosu is talking about creates confusion. The excitement over the Separability thesis as the messianic message for building the contents of African jurisprudence and, also, as the antidote to Africa's fledgling legal systems is bound to be short-lived. The issues, as discussed in Oladosu's essay, have been overtaken both by time and trend.

However, if Oladosu's insistence is on the conventional name, Separability thesis, it follows that, in the light of the distinction between exclusivist and inclusivist, a revision and reformulation is needed here inasmuch as it is true that what Oladosu holds the thesis to be is not what is actually projected. At the time when Oladosu wrote that seminal, thought provoking article, the facts about the distinction between exclusivist and inclusivist and the respective thesis held by each school are rather too obvious and already in the intellectual air.[69] Separability thesis is held onto by inclusivist but then the definition given by Oladosu is that of separation thesis held by exclusivists. This necessarily creates a problem for us in assessing his case for legal positivism. But then, we must, apart from this sundry observation, go on to assess his case for legal positivism in Africa. We should, however, bear in mind that in the nature and notion of Separability thesis a cultural claim is made that is suspect from the beginning.

On the whole, Oladosu's project is an attempt to make an African case for legal positivism. Essentially, therefore, Oladosu's work is a critique of the conclusions of Okafor and Taiwo on the undesirability of legal positivism as a legal charter and agenda for African legal systems. The basic point of Oladosu's paper is the view that whereas Okafor and Taiwo have branded legal positivism as dangerous, evil and completely alien to the African heritage, legal positivism represents one of the best blueprints for legal advancement in Africa. This is premised on what Oladosu classified as "the merit of legal positivism in the face of cultural diversities, ethno-national differences and religious heterogeneity" of each of the countries on the African continent.

It is very likely that Oladosu's arguments incorporate what he calls "compelling pragmatic reasons for the legal systems of modern African states to choose the positivist theory of law, in preference to the natural law theory." In his words,

> *"My case for the adoption of legal positivism by modern African states tracks on these facts of cultural diversity in traditional (or pre-colonial) Africa, conjoined with the unique colonial experiences, and the resultant post-independence ethnic and ethical composition of many African nation states at present."*[70]

As we consider on the title of Oladosu's paper, and we relate it to the reasons why a case is made for legal positivism, it is my estimation that there is something misleading in the title of the paper. Clearly, the basis for the choice of positivism's Separability thesis is not the diversities and differences observed concerning African states although it is obvious that there are indeed diversities in terms of language, religion, culture, ethnic groupings and so on. The compelling reason is actually pragmatism. Separability thesis is a pragmatic approach, not a cultural approach or thesis. In other words, it will serve as a pragmatic solution if a legal theory such as positivism that endorses the Separability thesis is adopted for Africa in the light of the pluralism and ethno-diversities. What it means is that since each culture is interested in retaining its legal identity, structures, and way of life, to assuage the possibility of conflict, it is pragmatic enough to suggest the adoption of a legal theory that projects a single approach for all.

From this view, it is clear to us that what then informs the case for the adoption of legal positivism is not a cultural basis or grounds, because what the theory does is to suggest as secondary cultural diversities but instead, adopts a pragmatic approach to eliminate the 'problem' of diversities. If this reasoning is followed and accepted, it means Oladosu's title is misleading. Legal positivism and the Separability thesis is therefore necessitated by pragmatic grounds, not cultural grounds since, in the first instance, the Separability thesis is not and has never been part, for example, of the way of life of the people i.e. their culture, and also, secondly, they are not actually interested in parting with their cultural identities to adopt

a new one. The diversities and differences provide a pragmatic basis or grounds for the adoption of positivists Separability. In itself and for itself, the thesis is not a cultural fact about and concerning Africa.

But then, this observation, subject to the elusive and slippery nature of philosophical interpretation, is secondary to what we think is important to Oladosu's view which is actually its perspective on pluralism and multiculturalism. In relation to the complex phenomenon of legal pluralism, certain ideas and notions can be ferreted from Oladosu's remarks above. In the first instance, it appears that Oladosu's statement acknowledges the prevalence of pluralism in the legal structures in Africa. In other words, it shows from the statement above that Africa is experiencing the complex phenomenon of legal pluralism, that is, the existence of either a dual legal structure or at a very general level multiple forms of legal normative frameworks in Africa. In his words,

> *…The elements of cultural diversity that characterized pre-colonial African societies have survived in the new nation states. The cultural differences are manifested in the various aspects of life, in different institutional structures and social practices, ranging from the most sacred—religious beliefs—to the most mundane, say, attitude toward commerce.*

Apart from a subtle neglect of the reasons why pluralism and diversities have thrived and are thriving in Africa from the pre-colonial to the post-colonial (disregard for a moment the challenges they often pose), it appears that Oladosu's estimation of cultural diversities undermines the charm and the appeal of pluralism especially within the context of a federal system of government where constitutional allocation of powers, responsibilities and resources are splintered in a responsible and constitutional manner.

Perceptively, pluralism or diversity is not an inherently bad organisational framework for human co-existence; it is the politicisation of our plurality that creates problems of momentous degree that states often find difficult to manage. In most cases, it seems that an aura of contextuality, circumstantiality and situationality are embedded in our conception and definition of the nature of plurality,[71] a similar feat shared by and that tends to inundate our understanding of the resilient concept of ethnicity in Africa. The same unsympathetic attitude and intellectual impatience that Austinian positivism had for federalism in his conception of law and the drafting of the statement of the Separability doctrine, and which attracted a dissipating sense of criticism from Hartian normativism, appears to be the same move Oladosu is suggesting for Africa.

In short, the Separability thesis may not be in consonance with the 'spirit' and substance of a federal system of government where levels of authority in the state are shared and plural in nature. In a federal set up, polycentricity, rather than monocentricity, seems to be the organising principle for governance including the all-important area of jurisprudence. The doctrine of Separability will amount to, in our opinion, a calculated strategy to stifle the dynamics of pluralism. Indeed, it can be reasonably argued that federalist jurisprudence, for instance, is a veritable option for developing the many possibilities inherent in pluralism. As a matter of fact, it is obvious to us that federalism, rather than Separability thesis, if adopted and allowed to operate very effectively, in terms of principles and practice, will lubricate rather than grind to a halt, the management of nations-states and the pluralism encoded in their very existence. Defending the authenticity of the federal principle in relation to nations-states, Vincent Ostrom contended that:

> *"If we view a federal society as a covenanting society capable of generating rich assemblages of associations, we should expect to see social units of one sort or another, formally independent but choosing to take each other into account, functioning in mutually accommodating ways to achieve many different patterns of order."*[72]

In another instance, Ostrom's defence of the federal principle makes the point against the Separability thesis and the positivism approach to jurisprudence, especially in and for Africa. In his opinion, it is federalism that is necessary for a plural society since it encourages plurality of institutions of governance in a way which accommodates the human members of such community. In a very prophetic and poetic style, as if giving an ultimate judgement on the Separability thesis in plural states, Ostrom reiterates that:

> *"If people are prepared to draw upon covenantal approach in relating to one another, alternatives become available to the Hobbesian presuppositions that a unity of power by a sovereign authority is necessary to the peace and concord of a commonwealth. Instead, people*

> *can fashion multiple autonomous relationships capable of taking collective decisions appropriate to different ways of giving expression to human community…the plurality of such arrangements facilitates the development of a rue of law among people capable of fashioning their own rules and binding one another to mutually agreeable terms and conditions…No supreme authority exists; all authority is subject to challenge…Law, in an open society, acquires a publicness when no instrumentality of government is allowed to function as the supreme authority. If the unity of law is to be achieved through unity of power exercised by a sole agent as sovereign representative, then that agent is in a position to determine the authoritative allocation of values and exercise command over the lawful instruments of force in that society. Such agents cannot be held accountable to others within the society. They are the judges of their own cause in relation to the interest of others. Law is a command, and the exercise of prerogative depends upon instrumentalities of control. This is the antithesis of federalism. People cannot govern in a system of command and control operating from a single center of ultimate authority in societies that reach out to continental proportions."*[73]

Apart from this, Oladosu's conception of the meaning of nation states in Africa is incorrect. In actual fact, he makes no distinction between the concept of nation states and nations-states. This has, however, been attempted earlier in the paper. Pluralism, cultural diversities, religious heterogeneity and ethno-national differences are lasting characteristics of nations-states, not nation states. It is very hard to come by nation states, as described by Oladosu, in Africa. Present geographical configuration of African states clearly reveals cases of nations-states, not nation states.

In addition, it behoves us to contend that, according to Oladosu, the existence of a legally pluralistic structure in Africa today is the interplay of episodic periods in Africa's complex history: the pre-colonial, colonial and post-colonial days. Legal pluralism did not just evolve from nowhere but is intertwined and intestinal to the history of Africa.

What seems a paranoid declaration and observation in Oladosu's seminal paper, in the third analysis, on the notion of pluralism in African legal system is actually the thought that pluralism, the multi-ethnic and culturally diverse nature of Africa as it relates to the area of the legal system is actually a problem in need of a solution. If this observation is true, then it follows that the next point is actually fundamentally significant which is that legal positivism and the insistence that law and morality be held separable, conceptually, is the best way for Africa to handle the dynamic but resilient problem of pluralism in Africa's legal world.

But then the critical question is: how do these facts of cultural diversities, ethno-national differences and religious heterogeneity make legal positivism compatible with and suitable for African legal systems? The answer, for Oladosu, lies in the fact that only legal positivism and its Separability thesis, that is, separation of law and morality, can accommodate these diversities. It means there is something inherently wrong with the existence of a plural legal normative space in African countries. The Natural law advocacy of the inseparability thesis, that is, inseparation of law and morality cannot handle these cases of diversities. It is likely to fall as a theory. Why? For Oladosu, the answer lies in the fact that there will be many legal, ethical and moral standards to choose from which is likely to create problem of choice in the face of these diversities. The best option, in his estimation, is the adoption of a legal idea or doctrine that emphasises separation and thus a single model for all.

Admittedly, there is a line of obvious similarity between Oladosu's argument for the desirability of legal positivism for African legal systems and Taiwo's rejoinder to and rejection of Okafor's "Legal positivism and the African legal tradition." However, there is a bit of divergence and one only needs to be perceptive enough to understand the tenor of arguments well-developed in both papers.

The heart of Taiwo's argument against Okafor's conclusion on legal positivism and the African legal charter is that Africa cannot and should not be said to present or possess one distinct and almost universal cultural tradition, values or even legal framework. There are different cultural traits that are not to be jettisoned but which are of intellectual, empirical and philosophical significance. In very relevant and coincidental terms, Oladosu concurs with this assertion as possessing significant worth in a penetrating understanding of the African milieu. This is where they both agree.

But then, whereas these premises and arguments led Taiwo to some conclusions, one of which consists in the view that legal positivism is a bad legal creed not only because of its un-Africaness, but because of its

implied consequences for any legal system for that matter, Oladosu's conclusion is to the end that those dissimilarities are the very wheels on which legal positivism is pragmatically the best for Africa.

Entailed in the whole argument especially the smart analysis on the several dimensions of diversities in a country like Nigeria, is a *reductio ad absurdum*. What makes the jurisprudence of Nigeria so special such that unless the Separability thesis is adopted in her legal system, the system is likely to fall like a pack of cards? What about diversities, differences and plurality, in other sensitive areas like religion, languages, culture? Why don't we, in line with the compelling pragmatic reasons, also, adopt a single approach to religion? Secularism, which has always been the ideology and stance of the Nigerian state in relation to religion, everyone knows, is a farce.

English language that has also been adopted as the lingua franca in Nigeria, of course, like Oladosu said poses a lot of problems for the populace. But, more significantly, it has only created a form of false consciousness for the people and in fact, right now, many Nigerian indigenes are lamenting the extreme damage that such an official policy with respect to language is having on the attractiveness of plurality as a veritable aspect of our national life.

The same damage is likely to be enforced and implemented on the platter of official jurisprudential policy where the Separability thesis is endorsed thus eroding the plural flavour that should naturally attend to our jurisprudence. It is the possibility of an erosion of the charm and advantage of plurality that are encoded in a postmodernist rejection of all meta-narratives and hierarchy of legitimisation that unduly problematises our diversities.

4. A Postmodernist Critique of 'An African Case for Legal Positivism'

In actual fact, there is no one conversant with the multifarious problems that Africa is beleaguered with that will not sympathise with her. It is with the heart of sympathy for her deleterious conditions that many therapies have been and are still being suggested to aid her quick recovery. But then, the therapy must consist in what she can bear in the light of the prevailing facts concerning her condition. It is in this sense that we appraise the suggestion of legal positivism's Separability thesis, from the viewpoint of postmodernism, as an erected legal charter for Africa.

In the first instance, our observation is that, from the conceptual point of view, it is perhaps mistaken to suggest that what African legal systems need is a legal positivist creed, the Separability thesis, which only allows for one legal position, that is, total separation of law from morality, in the face of disparities in ethnic, nationalistic, religious and cultural experiences. Even in the face of these differences, it is still to be understood that one legal position would not solve the problem of inconsistent characterisation in Africa's legal charter. Trenchantly, flexibility stands as a unique antidote to the challenges of diversities. Even in the face of diversities, what is needed is a system that accommodates existing pluralism.

Apart from this, Oladosu's compelling pragmatic reasons for the adoption of legal positivism for the African situation has not answered the question: how does legal positivism create norms and standards that are indeed suitable and appropriate for all cultures? How does legal positivists' Separability thesis manage citizens' feelings in the nations-state reeling under the challenges of pluralism? Again, how does legal positivism shed light on the problem or fact of legal pluralism in Africa? Interestingly, the important question is not just of domination but that of accommodation. This is because if it is true that there are differing ethno-national and cultural feelings and standards among African groups, then there is the strong possibility of not only increasing contacts between them but also conflict between groups. Holding to one legal standard that does not admit of change or accommodate equally contending spaces of normativity in the light of the interests of the groups in question would not be a problem-solving theoretical approach. This is the heart of postmodernist rejection of modernity, the modern and modernism in traditional philosophy. What then is the basis of a possible postmodernist rejection of legal positivism and the Separability thesis for Africa?

Of ready acceptance is the view that postmodernism represents one of the most influential philosophical doctrines to emerge in the history of western philosophy. In general, apart from being a controversial movement, it is, in the primary sense, a reactive movement. As a reactive movement, in the last half of

the twenty-first century, postmodernism, apart from feminism, appears to have had dramatic influence on practical and conceptual responses to the problems of our world.

Postmodernism could be characterised in many ways. In cultural theory and contemporary arts postmodernism seems the most-emphasised and under refined. Very interesting is its construct in relation to jurisprudence. In its conceptual form, postmodernism is the rejection of the project of modernism that began with the Cartesian quest and search for a single absolute truth. The obvious target in this whole panorama of intellectual outburst is Philosophy. For postmodernists such as Jean Francois Lyotard and Richard Rorty,[74] there no longer exists Philosophy with a capital P. There are only philosophies. There is no longer Truth, only discourses. There is no centre, only rapidly expanding margins.[75]

According to Lyotard, postmodernism designates a general condition of contemporary Western civilisation. It sees as non-existent in Western civilisation 'grand narratives of legitimation', that is, some set of overarching philosophies of history such as the Enlightenment story of the gradual but steady progress of reason and freedom, Hegel's dialectic of Spirit coming to know itself, and Marx's idea of a progressive march towards a utopia through a class revolution. What is repulsive for Lyotard and other postmodernists is the fact that these explanations of the universe are merely meta-narratives giving credence to modernism in the interpretation of the problem of legitimation.

In fact, the evil of modernism, for postmodernists, as represented in the Enlightenment story, the Hegelian dialectics and the Marxist idea of the evolution of a classless society is the fact that first-order situations are legitimated and grounded within a broader totalising metadiscourse.[76] Such meta-discourses are not to be seen as absolute in themselves but as an instance of one discourse out of a possible many. According to postmodernists, borrowing the phrase of Friedrich Nietzsche, there are only interpretations out of many different interpretations. In fact, no discourse is privileged to capture once and for all the truth of every first-order discourse.

The implication of this is the view that for postmodernists, legitimation, whether epistemic, moral, jurisprudential or political, no longer resides in philosophical meta-narratives rendered in universalistic and absolute terms. Rather, for postmodernists, legitimation of first-order situations is to be grounded in plural, local and immanent conditions. Hence, universal notions of justice, law, democracy, citizenship no longer exist but multiplicities of justice, jurisprudence, democracy and citizenship. According to Fraser and Nicholson, Lyotard's project can be seen as "the offering of a normative vision in which the good society consists in a decentralised plurality of democratic, self-managing groups and institutions whose members problematize the norms of their practice and take responsibility for modifying them as situations require."[77]

In consequence, postmodernism sponsors and celebrates the project of fragmentation in the world. This means a fragmentation of cultures, of meaning, of politics and political concepts, of ethics and moral truths, of the idea of justice,[78] and most importantly, a rejection of the Cartesian *cogito* which defines the self in relation to what the human mind does and not in relation to a cosmic order. The fiction of the *cogito* 'I think, therefore I am' should disappear from narratives and interpretations about the world.

Indeed, from a purely postmodernist account, Oladosu's paper is one of the several manifestations of the concerns and pretensions of traditional philosophy: the excessive desire for and obsessive demand for unity in the face of local and cultural contextual possibilities. More importantly therefore is the view that a postmodernist critique of Oladosu's position should not be found to be out of place. How would a postmodernist react to a position that cleverly vitiates the tremendous power that lies in the recognition of plural claims, identities and standards? In the main, therefore, one demonstrative fallout of postmodernism consists in the view that the idea of 'difference' is very significant in explaining social reality, including every legal system, and to this end, a dominant strategy in moving the world forward. Ironically, however, rather than stifling progress through adherence to one legal standard or idea, such as the Separability thesis, it has succeeded in paving way for the accommodation of hitherto rejected groups and culture in the framing of legal ideas and systems. In fact, implicit in this postmodernist agenda is the liberation of "colonized other life worlds."[79]

In this sense, postmodernist jurisprudence and politics elicit and accommodates the idea of splintered legal and moral ideals. In concrete terms, pluralism becomes a fresh, innovative agenda and thesis of postmodern jurisprudence and politics. Postmodern philosophy is positive for African legal systems. By rejecting positivists' Separability thesis, it tries to give renewed vigour to the recognition of rights of each

group to a stake in legal understanding and the legal system as a whole. The emphasis is on legal pluralism. In the words of de Sousa Santos, there is the decentralisation of the state by "pointing to the plurality of legal orders, both state and non-state existing in the same political space."[80]

The overall effect is the success in projecting and developing a new paradigm in the understanding of the legal subject and the legal system. It takes the notion of jurisprudence and its central connection to existing normative systems in each society away from its foundationalist structures built on the idea of universality to its contingent, partial and plurally situated character, thereby making room available for what was conceived hitherto in an exclusionary manner. The gain therefore is the exposure of groups to a sense of meaning and belonging.

As much as a lot of merit lies in Oladosu's labyrinth, it tends to present a picture of legalism in Africa in a way that is contrary to factual historical construction. The question is this is it not true that Africa, in the face of these diversities, had always had a system of law quite underrepresented in western jurisprudence? Our conclusion simply is this that the African case for legal positivism as presented in Oladosu's position paper is only a recommendation or suggestion but not in real terms, a description or narration of what Africans, even in the light of plurality of systems, in actual fact believe or subscribe to. The appeal to the heterogeneity of cultures does not in actual terms vitiate the power of inseparability that they endorse. In fact, in very clear terms, to suggest separation is one thing and to describe what Africans do in actual fact is a different thing altogether.

It may be said that all along, from the perspectives of culture and history, Africans had always conceived law and morality to be complementary terms in governance and administration of communities. Nkiriuka, for instance, argued that the principle of Ubuntu represents the highest point of moral development which is significant in explaining the nature as well as the basis of political obligation in Africa.[81] Most cultures in Africa have similar terms and linguistic concepts capturing the essence of the interconnectedness between law and morality. Quite silent in Nkiriuka's argument, though, is the view that communalistic feeling, as explained through Ubuntu, was home to the African soil. From the philosophy of Ubuntu, we can establish that existing in the metaphysical template in most African societies is the acceptance of a complementary, yet inseparable, union between law and morality. Gluckman's conclusion on the nature and character of Lozi jurisprudence, in our humble and modest opinion, falsifies the implicit severance suggested concerning the connectedness between law and morality in Africa by Oladosu. According to Gluckman,

> *"The pull and push of Barotse jurisprudence consists in the task of achieving justice while maintaining the general principles of law. This is clearly demonstrated in the fact that while at some time, the judges are compelled to go against their view of the moral merits of cases in order to meet the demand for certainty of law, on the other hand they try to vary the law to meet those moral merits."*[82]

Practices that actually exist cannot be denied of their concrete existence. It is a different thing altogether if it is the case that there is the absence of that practice. In this case, it is a proposition too plain to be contested that, observable in almost every African cultural system is the plain acceptance that ideals of law must coincide in the main with the tenets of justice. Holleman's timely observation about the nature of law and morality in Africa is instructive and, to our mind is a corroboration of Gluckman's view above. The African, according to Holleman,

> *"Knows that the relations between man and his fellowmen are not governed by law alone. Hence in the determinations of a lawsuit law is not taken as the only determining factor. The whole social setting and relationship of the parties and their positions in the community are taken into consideration; and in the interest of justice 'legal rules' are some time thrown overboard."*[83]

In a similar sense, drawing from the Igbo ethnic group in south-eastern Nigeria, Fidelis Okafor's submission appears to validate our earlier observation about the nature of law and morality, on one hand, and the plurality of normative legal spaces on the other, in many African societies. According to Okafor,

> *"The province of African jurisprudence is thus large enough to include divine laws, positive laws, customary laws, and any other kinds of laws, provided such laws are intended for the*

> *promotion and preservation of the vital force…. What is considered ontologically good will therefore be accounted as ethically good; and at length be assessed as juridically just."*[84]

From the above, it seems clear in our opinion that ideals of/for governance resonate in a plural system which contingently emphasises these plural spaces of normativity which, of course, are not only seen as acceptable but also binding. It also confirms that plurality of such legal normative spaces often find their way into the interpretation we give in expressing our understanding of the relation between law and morality. Trenchantly, plurality engenders inseparability viewed from a very robust normative perspective. But then why they hold unto such view of non-separation even in the light of their many differences is equally a different inquiry altogether.

We should, however, not confuse two important arguments central to the present task. One is the assertion of the compatibility/incompatibility of the Separability thesis with Africa. The second is the theory that the law of every state is derived from one single source - whether a sovereign, Grundnorm or rule of recognition, as claimed by Austin, Kelsen and Hart - is incompatible with the socially observed facts of legal pluralism in Africa. The question is: are these not separate arguments? The arguments indeed are separate but not unrelated. As a matter of fact, they are interwoven and there is no way one would provide good reasoning about one without touching on the other especially from the first to the second. When Oladosu argued on cultural grounds for the adoption of the Separability thesis, what was actually reiterated is the significance of his argument for Separability thesis in Africa having in view the plural and multi-ethnic condition in Africa. Viewed from this perspective, it means that, for Oladosu, the Separability thesis is not antagonistic to what we have called positivists' monocentric jurisprudence, the view that the law of every state is derived from one source.

Granted that this analysis is accurate and accepted, and actually captures Oladosu's intention, it follows in our thinking that positivism, both from the perspective of its endorsement of separabilism and monocentric jurisprudence, is antagonistic or unfriendly to jurisprudential pluralism. Based on this analysis of positivism, what we have attempted here, in a modest form, is the view that, given the socially observed facts about Africa in terms of her excessive pluralism and multi-ethnic composition, the positivists' agenda may not be helpful. Slightly sharing the view of Eberhard and Gupta, an acceptance of legal positivism hook, line and sinker into the mainframe of African living reality is to stall the move towards a truly emancipative cultural dialogue, a dialogue that rejects the West's projection of its cultural conception as the universal horizon for the organization of human living together. [85]

It, however, does not make positivism a totally flawed doctrine. It only means that the nature of pluralism and the multi-ethnic tendencies portrayed in the African conundrum needs a jurisprudential charter that is, despite its doctrinal sophistication, sympathetic and not oblivious of the belligerent and explosive nature and composition of its nations-states arrangement and the historical lampoon that legitimized the pluralism which has come to define and characterize Africa's submerged state of affairs.

As a matter of fact and history, multiculturalism, pluri-ethnicity and multilingualism appear to be lasting and distinguishing characteristics of the African continent. No description of specific states and countries in Africa seems complete without due reference to the existence of diverse cultures, multiple languages and several ethnic groups with distinct and different outlooks in life. This has not only added to the many pejorative characterisation of the African cast, but significantly explains the nature of the myriads of problems the continent is plagued with.

However, multiculturalism and pluralism cannot be described as simply unique to Africa; every other corner of the human globe tends to share in that virtual characteristic, Asia and Latin American countries being notorious examples. Phenomenally, globalisation, through the influence of vast communication networks, has opened up a new vista for the understanding of pluralism, diversity and, of course, the interdependence in which the world is ensconced. The unparalleled growth in information technology has exposed pluralism not only as an existentially delicate phenomenon but also a situated drama that each state needs to negotiate in relation to the attitudes and feelings of individuals and groups within such states. This existential possibility confronts Africa as well as the rest of the world.

In this regard, it is not impossible to read into the universe of many African countries the problem of nation building. Retrospectively, the problem of nation building in Africa is still explained in the light of the problem of the eclectic ethnic composition of these countries. That the process of nation building in African countries can still be described as enigmatic is not without its historical evidence. There are

varying opinions in these attempts at objectifying and situating the historical evidence for this perennial complex. There is the strong assertion, in ear-splitting terms, that the origin of this predicament is indeed traceable to the heedless manner in which the European colonial overlords administered and managed the colonial territories without due regard to the cultural peculiarity and idiosyncrasies of each of those colonial territories.

There is a modicum of truth in the assertion that the intractable problem of nation-building in Africa is partly the result of the imposition on African peoples of the boundaries drawn by the Europeans in the second half of the nineteenth century. These boundaries were such that they failed to take into account the multicultural nature and plural characteristics of the different people placed within the same territorial borders. Hence, multiculturalism and pluralism are very pertinent general characteristics of the African condition, courtesy of colonialism. The resilience of multiculturalism and the sway of the multi-ethnic composition of African countries as a potent disruptive phenomenon in African life are thus multifaceted especially in the area of politics, religion, social interactions and relations and in the distribution of material and economic resources.

In the past, and even now, however, the problems of multiculturalism and pluralism have been limited to the political realm alone in terms of the problem of ethnicity, religious crisis, ethnic chauvinism, acrimony and animosity, without an opportunity of extension of the implications of multiculturalism and pluralism to the problems of healthcare facilities, educational policies and, more recently, in the area of the legal system and in the construction of jurisprudential worldview and policies. Colonialism in Africa thrived basically via the instrument of law. Colonialism and its several impacts cannot be meaningfully quantified outside the consideration of the role of law. Legalism was thus a very basic characteristic of colonial rule in Africa. As observed by Roberts and Mann, law was not only the very basis on which colonialism ran but the instrument through which it changed the nature of the colonies.

Perceptively, colonialism, "sought to impose a new moral as well as political and economic order, founded on loyalty to metropolitan and colonial states."[86] Legal pluralism was therefore a necessary outcome, though artificial creation, of colonialism. State jurisprudence, which is that of the colonial state, differed and co-existed with the various cultural groups and their conception of law. Just as the tension between subjects and citizens constituted one of the definitions of the dilemma of colonialism, navigating and negotiating the dynamics of this bifurcation in the jurisprudence of the colonies was an added component of this dilemma. Change and conflict were two key words in explaining this dilemma. Change from set of legal rules ensconced and accepted only on the basis of tradition and cultural logic to a set of legal rules imposed by Her Majesty were immediate causes of conflict in the perception of subjects in the different colonies. It is in this sense that we can claim that change and conflict were the defining tunes of the dynamism of pluralism in the legal structure that prevailed during the era of colonialism.

Apart from the fact that colonialism created a bifurcation in the jurisprudential structure of most African countries in terms of local, indigenous and native jurisprudence on the one hand and colonial and imperial jurisprudence on the other, the expiration of colonialism rather deepened the already bifurcated jurisprudential and legal system in African countries. In other words, while state jurisprudence fostered an imperial structure patterned after the colonial state, most nationalities and ethnic groups have come to understand the significance of relishing the continuity of ethnic nationalistic feelings in relation to the creation of norms and laws patterned after ethnic group consciousness. There is therefore a modicum of truth in the assertion that the incidence of legal pluralism in most African nations-states are actually fostered and created by the feelings of ethnic nationalism. Legal pluralism is therefore foundationally influenced and impacted by ethnic nationalistic feelings.

Legal nationalism can thus be viewed from two very important perspectives: one induced by disenchantment with colonial state jurisprudence with its anti-democratic features and characteristics and, two, one induced by ethnic nationalities informed by the realisation that state laws are often unsympathetic to the feelings of different ethnic groups located within specific nations-states. While the former heralded the problem of dual jurisprudence during colonialism the latter is what has occasioned the idea of legal pluralism in nations-states in Africa. The idea of legal pluralism in nations-states is, however, in consonance with the general and specific concerns of what Sarat,[87] Howes[88] and Kasirer[89] have variously tagged as cultural jurisprudence. Navigation into legal pluralism in nations-states is, in a sense, an inquiry into aspects of cultural jurisprudence.[90] The theoretical and practical premises on which cultural jurisprudence is built appears to be a modern justification for the project of pluralism in the

jurisprudential framework of nations-states in Africa even though the substance and concerns of cultural jurisprudence, both as an intellectual activity and practical engagement, are yet to be appropriated in the legal-constitutional developmental processes of nations-states in Africa.

Endnotes:

[1] For a comprehensive outlook on the nature and state of the controversy over the possibility of African philosophy, see Moses Makinde's new book Makinde, M. (2005) *African Philosophy: The Demise of a Controversy* (Ile-Ife: Obafemi Awolowo University Press).

[2] Funnily enough, a lot has been said in the literature concerning the African self or what is meant by the notion of identity. African identity has somewhat been denied especially in relation to its intellectual contents and components. Observable in these comments are elements of racial prejudice. The image often projected about the African self is one essentially encoded in stereotypes of primitivism. See Howe, S. (1998) *Afrocentrism. Mythical Past and Imagined Homes (*London: Verso). By and large, Africa is said to be primitive meaning that Africa is a "breed apart, a throwback to earlier evolutionary times", "the primitive 'Other' against whose arrested development one's own progress could be measured." see Lindfors, B. (1984) 'The Bottom Line: African Caricature in Georgian England', in *World Literature Written in English* Vol. 24, pp. 43-51. Against this background, it could be said that Africa will continue to wallow in squalor and the wheels of progress stifled if the ideological interests and mindset behind all racial pronouncements, castigations and perceptions are not exposed and disposed. It is in this sense that one concurs with Ahiauzu Nkiriuka that the definition of the self is what is inviting when the possibility of African legal theory is explored. And this observation tallies, in a very significant sense, with the heartbeat of postcolonial discourse as it appertains to the African milieu a discourse that McClintock, in a frenetic mood, calls a "prematurely celebratory positions". McClintock, A. (1995) *Imperial Leather. Race, Gender and Sexuality in the Colonial Conquest* (New York and London: Routledge).

[3] Ahiauzu, N. (2006) 'Ubuntu and the Obligation to Obey the Law' *Cambrian Law Review* 37, pp. 17-36 at p. 20.

[4] Postcolonialism is not itself a monolithic construct or a generally agreed view; it is as controversial as what it portends to challenge. In our view, three different orientations can be discerned in the orbit of postcolonial theory. One, those who see it as an achieved state, a period or state of celebration or a break from the colonial see McClintock, A. (1995) *Imperial Leather. Race, Gender and Sexuality in the Colonial Conquest*. Two, those who regard the postcolonial as birthed or influenced by the colonial. According to Simon Gikandi, "postcolonial theory is one way of recognizing how decolonized situations are marked by the trace of the imperial pasts they try to disavow. See Gikandi, S. (1986) *Maps of Englishness. Writing Identity in the Culture of Colonialism* (New York: Columbia University Press) at p.15. The third group represents a broader perception of postcoloniality in the sense that for them, it stands as a global process rather than a process which is limited to colonized societies alone. According to Hall, one of the principal values the term 'postcolonial' has been to direct our attention to the many ways in which colonization was never simply external to the societies of the imperial metropolis. It was always inscribed deeply within them−as it became indelibly inscribed in the cultures of the colonized." See Hall, S. (1996) 'When was 'the Postcolonial'? Thinking at the Limit' in Chambers, I. and Curti, L. (eds.) *The Postcolonial Question. Common Skies, Divided Horizons* (London and New York: Routledge) pp. 242-260 at p. 246. Perceptively, it appears that Nkiriuka's conception of the postcolonial in relation to the possibility of African legal theory belongs to the first category.

[5] Marshall's observation about Africans especially from the west coast is to be applauded but then with caution. Marshall's argument, quite contrary to the average British mind and intelligence, is that natives or the Negroes of the Western Coast in Africa had a set of laws before the advent of colonialism and that the laws were, in a very major sense, different from the heart of British cultural life. In the words of Marshall, "what I wish to say is that the natives of the Gold Coast and the West Coast of Africa have a system of laws and customs which it will be better to guide, modify and amend rather than destroy by ordinance and force." See *Journal of African Law*, Vol. 16, 1887, at p. 182. This statement was made at the very commencement of colonialism in Africa and yet it is significant in our consideration of the dilemma of legal pluralism in modern nations-states. By inference it could be said that what modern states are up to is destruction and perennial modification of the legacy of legal pluralism using the instrument of force and ordinance. Marshall's statement also provides a useful hint on why British imperialism endorsed or imposed on some colonies in West Africa forced federalism, that is still a

phenomenal failure and of colossal damage in postcolonial times rather, than a confederation. The pattern and ideology of the colonial order was force and conquest rather than consent and consensus. The contemporary rape on pluralism is obvious.

[6] Okafor, F. (2006) 'From Praxis to Theory: A Discourse on the Philosophy of African Law' *Cambrian Law Review* 37, pp. 38-9. Tempels, P. (1969) *Bantu Philosophy* (Paris: Presence Africaine) but then the work has been criticized as a major work in ethnophilosophy. The debate whether ethnophilosophy is proper philosophy is still on. See, for instance, Hountoundji, P. (1996) *African Philosophy: Myth or Reality?* (Bloomington: Indiana University Press).

[7] Driberg, J. G. (1934) 'The African Conception of Law' *Journal of Comparative Legislation and International Law* 230, pp. 237-238; Holleman, J. F. (1974) *Issues in African Law* (The Hague: Mouton and Co).

[8] M'Baye, K. (1975) 'The African Conception of Law' in David, R. (ed.) *International Encyclopedia of Comparative Law, Vol. II: The Legal Systems of the World and their Common Comparison and Unification* (International Association of Legal Science); Smith, M.G. (1965) 'The Sociological Framework of Law', in Kuper, H. and Kuper, L. (eds.) *African Law: Adaptation and Development* (Berkeley, CA: University of California Press); Hartland, E. S. (1924) *Primitive Law* (London: Methuen).

[9] According to Hart, a pre-legal society is a regime of primary rules only notable for three defects: defects of uncertainty, the defect of the static character of the rules, and the defect of inefficiency of the diffuse social pressure by which the rules are maintained. For Hart, these defects are corrected by the introduction of rules of recognition, rules of change, and rules of adjudication. This body of rules forms the core of "secondary rules" which translates the pre-legal system to a legal system. In his words, "the introduction of the remedy for each defect might, in itself, be considered a step from the pre-legal into the legal world; since each remedy brings with it many elements that permeate law: certainly all three remedies altogether are enough to convert the regime of primary rules into what is indisputably a legal system" Hart, H. L. A. (1961) *The Concept of Law* (Oxford: Clarendon Press) pp.80-85. It is no gainsaying that the school of ethno-jurisprudence would subscribe to a wholesale acceptance of Hart's translative recipe.

[10] Okafor, F. U. (1984) 'Legal Positivism and the African Legal Tradition' *International Philosophical Quarterly* Vol. xxiv, No.2, Issue 94, pp. 157-164; Taiwo, O. (1985) 'Legal Positivism and the African Legal Tradition: A Reply' *International Philosophical Quarterly*, Vol. xxv, No. 2, Issue No 98, pp. 197-200; Nwakeze, P. C. (1987) 'A Critique of Olufemi Taiwo's Criticism of Legal Positivism and African Legal Tradition' *International Philosophical Quarterly*, Vol. Xxvii, No. 1, Issue 105, pp. 101-105.

[11] Elias, T. (1956) *The Nature of African Customary Law* (Manchester: Manchester University Press); Gluckman, M. (1972) *The Ideas in Barotse Jurisprudence* (Manchester: Manchester University Press); Dlamini, A. M. (1997) 'African Legal Philosophy: A Southern African View' *Journal for Juridical Science* 22(2) pp. 69-83. This view represents, in our opinion, the purely legal and sociological approach to a question of fundamental significance does an African jurisprudence exists. In recent times, a hermeneutic cum philosophical response has been provided to that question. See Murungi, J. (2004)'The Question of African Jurisprudence: Some Hermeneutic Reflections' in Wiredu, K. (ed.) *A Companion to African Philosophy* (Malden Massachusetts: Blackwell Publishing Limited) pp. 519-526; Idowu, W. (2004) 'African Philosophy of Law: Transcending the Boundaries between Myth and Reality' <http://www.brunel.ac.uk/faculty/arts/EnterText> accessed on 18 December 2008.

[12] Ahiauzu, N. *op. cit.*, at p. 19.

[13] Oladosu, J. (2001) Choosing a Legal Theory on Cultural Grounds: An African Case for Legal Positivism' <http://www.westafricareview.com/vol2.2/oladosu.html> accessed on 18 December 2008.

[14] See Roberts, S. (1998) 'Against Legal Pluralism: Some Contemporary Reflections on the Broadening of the Legal Domain' in *Journal of Legal Pluralism* 42, pp. 92-106.

[15] See Hart, H. L. A. *op. cit.* at p. 1.

[16] Pospisil, L. (1971) *Anthropology of Law: A Comparative Perspective* (New York: Harper and Row) at p. 39.

[17] Benda-Beckmann, F. von (2002) 'Who is Afraid of Legal Pluralism?' *Journal of Legal Pluralism* 47, pp. 37-82 at p. 37.

[18] Merry, S. E. (1988) 'Legal Pluralism' *Law and Society Review* 22(5), pp. 869-901at p. 869. See also Berman, H. J. (1983) *Law and Revolution, The Formation of Western Legal Tradition* (Cambridge, Mass.: Harvard University Press).

[19] Griffiths, J. (1986) 'What is Legal Pluralism?'*Journal of Legal Pluralism and Unofficial Law* 24, pp. 1-55.
[20] Ibid. at p. 3.
[21] Ibid.
[22] Idowu, W. (forthcoming) 'From the Theory of Consent to the Theatre of Conflicts: Theoretical Perspectives on the Changing Character of the Modern State' *Social Science Journals of International Studies*.
[23] Griffiths, J. *op. cit.*, at p. 4.
[24] Galanter, M. (1981) 'Justice in Many Rooms: Courts, Private Ordering and Indigenous Laws' *Journal of Legal Pluralism* 19, pp. 1-47 at p. 20.
[25] Griffiths, J. *op. cit.*
[26] Merry, S. E. *op. cit.*, at p. 872. According to Sally, the former term refers to the analysis of the intersection between indigenous laws and European law. The meaning is that the setting for an analysis of what is meant by classic legal pluralism is colonialism. Legal pluralism is therefore a concept brewed, given its natural moorings, within the vestige of Colonialism. However, new legal pluralism emphasizes that plural normative orders are found in virtually all societies and not just in those societies that were colonized. This is an extraordinarily powerful move, in that it places at the center of investigation the relationship between the official legal system and other forms of ordering that connect with but are in some ways separate from and dependent on it. The new legal pluralism moves away from questions about the effect of law on society or even the effect of society on law toward conceptualizing a more complex and interactive relationship between official and unofficial forms of ordering. In- stead of mutual influences between two separate entities, this perspective sees plural forms of ordering as participating in the same social field. See p. 873.
[27] Moore, S. (1973) 'Law and Social Change: The Semi-autonomous field as an Appropriate field of study' *Law and Society Review* 70, pp. 719-746.
[28] Merry, S. E. *op. cit.* At p. 869.
[29] Tade, A. A. (1997) *Globalisation and Social Policy in Africa Issues and Research Directions* (Dakar: Codesria) at p. 8.
[30] The choice of the phrase is significant: Van Gusteren once noted that the concept of citizenship appears dehydrated among political thinkers. See Gunsteren, H. van *(*1978) 'Notes towards a theory of citizenship' in Dallmayr, F. (ed.) From Contract to Community (New York*:* Marcel Decker) at p. 9. However, Kymlicka and Wayne in their thought provoking article have demonstrated that the age of the debate between the libertarians and communitarians coupled with the upsurge in nationalism and religious fundamentalism and violence and the breakup of the one party state in former Soviet Union are factors accounting for the return of the citizen. It is believed that a rejection of the agenda of pluralism could, in another sense, complicate the salience of the life of the citizen in modern states.
[31] See the introduction: Rorty, R. (1991) *Objectivity, Relativism, and Truth* (Cambridge: Cambridge University Press).
[32] Ibid., at p. 22.
[33] Eberhard, C. and Gupta, N. (2005) 'Legal Pluralism in India: An Introduction' *Indian Socio-Legal Journal* 31, pp. 1-10.
[34] Ibid. at p. 1.
[35] Macdonald, R. A. (1998) 'Critical Legal Pluralism as a Construction of Normativity and the Emergence of Law' in Lajoie, A. et. al. (eds.) *Théories et émergence du droit : Pluralime surdetérmination, effective,* (Montreal : Editions Themis) pp. 12-23.
[36] Arnaud, A. (1995) 'Legal Pluralism and the Building of Europe' Réseau Européen Droit et Société
[37] Macdonald, R. A. *op. cit.* at p.18.
[38] Étienne, L. (1999) *Lejeu des lois. Une anthropologie "dynamique" du Droit* (Paris: LGDJ)
[39] Herder, G. W. (1995) 'Ideas for a Philosophy of History' in Barnard, F. M. (ed.) *Herder's Social and Political Thought* (Oxford: Oxford University Press) at p. 324.
[40] Gyekye, K. (1997) *Tradition and Modernity Philosophical Reflections on the African Experience* (Oxford: Oxford University Press) at p. 79.
[41] Pareto, P. (1963) *The Mind and Society: A Treatise on General Sociology* (New York: Harcourt Brace) at p. 1837.
[42] The controversy between the structuralists and primordialists is a case in point. According to the structuralists, ably represented by scholars such as Edmund Leach and Frederik Barth, ethnicity resides primarily in the existence of structural relationships rather than cultural factors. Primordialists, such as Edward Shils and Clifford Geertz, on their part, maintain that culturally distinctive characteristics such as

myths of origin, ritual, religion or genealogical descent constitute the basis of ethnicity. Named outside the scope of this controversy, Charles Keyes is of the opinion that in defining ethnicity, the clue lies essentially in culture. Cynthia Enloe, however, argued that what constitute the basis and breadth of ethnicity is the consciousness of a common identity. Identity and consciousness, however, going by debates in philosophical anthropology and philosophical metaphysics are more controversial issues even now than before, especially with seasoned and expert discourses on the notion of artificial intelligence, influence of robotics and information technology. As a matter of fact, identity discourses are sharply becoming a 'no-go-area' arising from the debate between the essentialists and the non-essentialists. Evidently, the debates, arguments and controversies appear endless. In all, however, can be discerned a close connection between ethnicity i.e. the feelings of belonging to a common socio-cultural group and a nation which is, definitionally, the group in question. Thus, the group one has consciousness towards which is definitionally the ethnic group is also the nation. Thus, ethnicity is meaningful in the existence of an ethnic group which possesses the characteristic of a nation. A detailed reference can be seen in the following texts: Leach, E. (1954) *Political Systems of Highland Burma* (Cambridge: Cambridge University Press); Barth, F. (ed.) (1969) *Ethnic Groups and Boundaries* (Boston, MA: Little Brown); Shils, E. (1957) 'Primordial, Personal, Social and Civil Ties' *British Journal of Sociology* 7, pp. 113-145; Geertz, C. (1963) 'The Integrative Revolution: Primordial Sentiments and Civil Policies in the New States' in Geertz, C. (ed.) *Old Societies and New States* (New York: Free Press) pp: 105-57; Keyes, C. (1976) 'Towards a New Foundation of the Concept of Ethnic Group' *Ethnicity* 3, pp: 202-13; Enloe, C. (1973) *Ethnic Conflict and Political Development* (Boston, MA: Little Brown).

[43] Gyekye, K. *op. cit.* at p. 81.

[44] See, for instance, Aluko, M. A. O. (2003) 'Ethnic Nationalism and the Nigerian Democratic Experience in the Fourth Republic' *The Anthropologist* 5(4) pp. 253-259. The opening sentence of the paper is an apt demonstration of the import of the intellectual misconstruction in the use of the word *nation*. According to the opening sentence, "Nigeria is a *nation* presently in a deep infectious and outrageous crisis that cries…for attention; see p. 253.

[45] Gyekye, K. *op. cit.* at p. 81.

[46] Russell, B. 'The Problems of Philosophy' in Gould, J. A. (ed.) *Classic Philosophical Questions* (Oxford: Clarendon Press) pp. 26-32.

[47] Brubaker, W. R. (1989) *Immigration and the Politics of Citizenship in Europe and North America* (Lanham, Md: University Press of America).

[48] Okafor, F. U. *op. cit.*

[49] Taiwo, O. *op. cit.*

[50] Nwakeze, P. C. *op. cit.*

[51] Okafor, F. U. *op. cit.* at p. 157.

[52] Ibid., p. 164

[53] Ibid., p. 163

[54] Ibid., p. 199

[55] Taiwo, O. *op. cit.*at p. 198.

[56] Some scholars have argued that there is a kind of general and pertinent similarities that can be observed about African socio-political life despite the vast multiethnic composition that Africa presents. Teslim Elias, for instance, argued quite contrary to the thoughts of Taiwo that "*it is not to be expected that, amidst such a diversity of peoples and in such a considerable land area as the African continent, any uniform and invariable pattern of society should exist…but in spite of this diversity, we have to bear in mind the strong evidence of general similarities which writers who have studied Africa at first hand and appreciatively, have vouchsafed to us."* See Elias, T. O. *op. cit.* at p. 8.

[57] Nwakeze, P. C. *op. cit.* at p. 101.

[58] [58] Waluchow, W. (1998) 'The Many Faces of Positivism' *University of Toronto Law Journal*, 48(3), pp. 387-449.

[59] Hart, H. L. A. (1957) 'Positivism and the Separation of Law and Morals' *Harvard Law Review* 71, pp. 593-629 at p. 595.

[60]Oladosu, J. *op. cit.* at p. 7.

[61] Hart, H. L. A. (1961) *The Concept of Law* at p. 181.

[62] Hart, H. L. A. (1957) 'Positivism and the Separation of Law and Morals' at p. 599.

[63] A few examples can be provided. One that easily comes to mind is that of D'amato who reasoned that positivists are engaged in a form of moral dilemma by insisting on the Separability thesis. According to him, *Not only do positivists insist upon separating law from morality, but they also appear to be unable to deal with moral questions raised by law once the two are separated. This inability stems, I believe,*

from their simultaneous attempt to assert and to prove that law and morality are separate; the argument reduces to a vicious circle. See D'Amato, A. (1985) 'The Moral Dilemma of Positivism' Valparaiso University Law Review 20, pp. 43-57. In the same vein, Hart himself noted the difficulty loaded into the Separability thesis. The dilemma pointed out by D'Amato was actually envisaged by Hart himself when he opined that "w*hat surely is most needed in order to make men clear sighted in confronting the official abuse of power, is that they should preserve the sense that the certification of something as legally valid is not conclusive of the question of obedience, and that, however great the aura of majesty or authority which the official system may have, its demands must in the end be submitted to a moral scrutiny.*" See Hart, H. L. A. (1961) *The Concept of Law* at p.206. According to Brian Bix, the dilemma envisaged by Hart, as pointed out above, explains, naturally, the division in contemporary legal positivism between the hard and soft positivist with Hart, in the posthumously published "Postscript" to *The Concept of Law*, Hart indicated that he saw soft positivism as better reflecting his own views and intentions. Hart, H. L. A. (1961) *The Concept of Law* at pp. 247-254. In his essay "Farewell to 'Legal Positivism': The Separation Thesis Unravelling", Klaus Füßer claims that the Separability (separation) thesis is 'hopelessly ambiguous,' having the extra ordinary capacity of blurring our understanding of law both in conceptual and practical terms. This contention, argues Klaus Füßer, is not without its basis. According to Füßer, positivists' separation thesis 'has been vacillating between object-level contentions about moral qualities of the law, on the one hand, and the meta-level issue of whether basic juridical concepts should be explicated free of moral injections, on the other hand. Füßer, K. (1996) 'Farewell to Legal Positivism' in George, R. P. (ed.) *The Autonomy of Law: Essays on Legal Positivism* (Oxford: Clarendon Press) at p. 120.

[64] The debate between these two camps involves a difference in interpreting or elaborating one central point of legal positivism: that there is no necessary or conceptual connection between law and morality. Exclusive positivism is championed by positivists such as Joseph Raz (who inherited the Oxford legacy from Hart), Raz, J. (1994) *Ethics in the Public Domain* (Oxford: Clarendon Press); Marmor, A. (2002) 'Exclusive Legal Positivism' in Coleman, J. and Shapiro, S. (eds.) *Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford: Oxford University Press); Shapiro, S. (1998) 'On Hart's Way Out' *Legal Theory* 4, pp. 469-507. Inclusive positivism is championed by Coleman, J. (1982) 'Negative and Positive Positivism' *Journal of Legal Studies* 11, pp. 139-64; Waluchow, W. (1994) *Inclusive Legal Positivism* (Oxford: Clarendon Press) and Hart himself.

[65] The separation thesis is championed by exclusive legal positivists while the Separability thesis is advocated and held by inclusive legal positivists. According to Jules Coleman, the questions that both theses pay attention to are different in terms of their logical strength. The separation thesis entails the question of whether law and morality are necessarily separated. The separability thesis entails the question whether law and morality are not necessarily connected. See Coleman, J. (1996) 'Authority and Reason' in Robert, P. (ed.) *Autonomy of Law Essays on Legal Positivism* (Oxford: Clarendon Press) at p. 290. According to Waluchow, whether, as a matter of conceptual necessity, these internal criteria can ever make reference to morality, and therefore be moral criteria, is what separates the two conceptual versions of legal positivism. Waluchow, W. (1998) 'The Many Faces of Positivism' at p. 6.

[66] This thesis was propounded by Tom Campbell, an Australian legal positivist. According to Campbell, "ethical positivism" is the view that determinations of law ought never to depend on moral considerations even though they in fact quite often do in the operation of modern legal systems. In other words, Campbell's reasoning consists in the view that as a matter of sound political morality, the "identification and application of law ought to be kept as separate as possible from the moral judgments which go into the making of law." See Campbell, T. (1996) *The Legal Theory of Ethical Positivism* (Aldershot: Dartmouth Publishing Co. Ltd) at p. 3. One major problem with the thesis is that it is too idealistic.

[67] For comprehensive details of the fallibility thesis, see Füßer, K. *op. cit.* at p. 122.

[68] A very nice treatment of the neutrality thesis can be seen in Morauta, J. (2004) 'Three Separation Theses' in *Law and Philosophy* 23, pp. 111-135. Also, see Füßer, K. *op. cit.* at p. 34.

[69] Jare Oladosu's work was published in 2001. The distinction between exclusive and inclusive positivists can be credited to H. L. A. Hart's 1994 posthumously published "Postscript" to *The Concept of Law*. In it Hart commented that inclusive legal positivism was a better reflection of his own position on the relation between law and morality. The meaning here is that the controversy between inclusive and exclusive positivism over law and morality by 2001 when Oladosu published his own paper was already a popular debate. The implication of that debate for positivism on the value thesis was not replicated and analyzed by Oladosu when it was obvious that the central points and ideas involved in the debate were either accepted or rejected by numerous legal scholars and philosophers by 2001.

[70] Oladosu, J. *Op. cit.*

[71] In explaining this point, a cue can be taken from the thoughts of Deconstructionism. According to Jacques Derrida, the meaning of a text depends on its context. Plurality is not a bad natural or political phenomenon. What creates problems in our understanding or interpretation of plurality lies in the context or the circumstances in which it is presented or the context of its use. Context or circumstances, therefore, determines our estimation and evaluation of the nature, meaning, relevance, scope, limitations and implications of plurality or pluralism. For example, during the first and second republic in Nigeria, many politicians, in a bid to achieve popularity and victory at the polls often resort to emphasizing our separate ethnic identities and a eulogisation of our commonality. At other times, especially in relation to class interests, separate ethnic plural identities are not emphasized because of the consideration towards the sharing of largesse. Different contexts produce different meanings on what our diverse plurality is.
[72] Ostrom, V. (1994) *The Meaning of American federalism Constituting a Self-Governing Society* (California: ICS Press) at p. 224.
[73] Ibid., pp. 253-54.
[74] Rorty insists that there is no "skyhook" which takes us out of our subjective conditions to reveal a reality existing independently of our own minds or of other human mind." Rorty, R. *op. cit.* at p. 13.
[75] Solomon, R. and Higgins, K. M. (1996) *A Short History of Philosophy* (New York: Oxford University Press) at p. 300.
[76] Lyotard, J. F. (1984) *The Postmodern Condition: A Report on Knowledge* (Minneapolis: University of Minnesota Press). See also Fraser, N. and Nicholson, L. (1997) 'Social Criticism without Philosophy: An Encounter between Feminism and Postmodernism' in Meyers, D. (ed.) *Feminist Social Thought: A Reader* (New York: Routledge) at p. 134.
[77] Fraser, N. and Nicholson, L. (1997) 'Social Criticism without Philosophy: An Encounter between Feminism and Postmodernism' at p. 135.
[78] Solomon, R. and Higgins, K. M. *op. cit.* at pp. 300-01
[79] See Habermas, J. (1987) *The Theory of Communicative Action, Vol. I & II* (Boston: Beacon Press).
[80] See Santos, B. de S. (1992) 'State, Law and Community in the World System: An Introduction' *Social and Legal Studies* 1(2), pp. 131-142 at p. 133.
[81] Ahiauzu, N. *op. cit.* at p. 32.
[82] Gluckman, M. (1963) *Order and Rebellion in Tribal Africa* (London: Cohen and West) at p. 198.
[83] Holleman, J. F. (1974) *Issues in African Law* at p. 17.
[84] Okafor, F. U. (1984) 'Legal Positivism and the African Legal Tradition' at p. 163.
[85] Eberhard, C. and Gupta, N. (2005) 'Legal Pluralism in India: An Introduction'.
[86] Roberts, R. and Mann, K. (1991) 'Law in Colonial Africa' in Roberts, R. And Mann, K. (eds.) *Law in Colonial Africa* (Portsmouth, NH: Heinemann Educational Books Ltd) at p. 3.
[87] See Sarat, A. and Kearns, T. (1998) *Law in the Domains of Culture* (Ann Arbor: University of Michigan Press)
[88] See Howes, D. (2005) 'Introduction: Culture in the Domains of Law' *Canadian Journal of Law and Society* 20(1), pp: 9-29.
[89] See Kasirer, N. (2002) 'Bijuralism in Law's Empire and in Law's Cosmos' *Journal of Legal Education* 52, pp. 29-41.
[90] Cultural or cross-cultural jurisprudence or cultural justice system can be simply defined as one that recognizes, honours and protects the rights of cultural contribution in the creation, development, growth, and maintenance of an equitable, workable and systematic justice system in order to fulfill the mutual self-supporting destinies of such cultural groups.

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