

*W Idowu*

---

## Positivists' separability thesis reconsidered: Perspective from African legal theory

### Summary

One major element of the push and pull of contemporary jurisprudence is the controversy between positivism and naturalism on how best to conceptualise and, thus, problematise the exact relation between law and morality. Termed the Separability-Inseparability debate, this article attempts a re-examination of positivists' Separability thesis from the perspective of African legal theory. The paper discovers that contemporary positivism is divided between the exclusivists and inclusivists over the precise relation between law and morality. The paper argues that the Separability thesis is incompatible with African philosophy of law going by the fact that jurisprudence in most of the African society has the flavour of a reconciliatory, humanistic and communalistic orientation which makes it expedient, in such societies, to define the relationship between law and morality as a complementary one rather than separable.

### Positiviste se skeidbaarheidstesis in heroorweging geneem: Perspektiewe vanaf Afrika regsteorie

'n Belangrike aspek van die werkinge van kontemporêre regsgeleerdheid is die twispunt tussen positivisme en naturalisme oor hoe om die verhouding tussen die reg en moraliteit ten beste te verstaan en krities te betrag. Getiteld die Skeidbaarheid-Onskeidbaarheidsdebatte, probeer die artikel om die positivistiese Skeidbaarheidstesis vanaf 'n Afrika regsteorie perspektief te herondersoek. Die werkstuk ontdek dat kontemporêre positivisme verdeeld is tussen die eksklusiviste en die inklusiviste oor die presiese verhouding tussen die reg en moraliteit. Die werkstuk voer aan dat die Skeidbaarheidstesis teenstydig is met Afrika regsfilosofie gebaseer op die feit dat jurisprudentie in meeste van die Afrika gemeenskap 'n versoenings-, humanistiese en kommunalistiese oriëntasie het. In sulke gemeenskappe maak hierdie feit dit wenslik om die verhouding tussen die reg en moraliteit as aanvullend eerder as skeibaar, te definieer.

## 1. Introduction

It is evident that there persist, in western canonical works, a great denial of the possibility of African jurisprudence. This denial is grounded in the claim that whatever is African contributes nothing to philosophy.<sup>1</sup> Taiwo's capture of this dilemma for Africa is poetic, contending that "all too often, when African scholars answer philosophy's questions, they are called upon to justify their claim to philosophical status. And when this status is grudgingly conferred, their theories are consigned to serving as appendices to the main discussions dominated by the perorations of the "Western Tradition".<sup>2</sup> To corroborate Taiwo's timely observation, jurisprudential problems such as the nature of law, the source and grounds of obligation, the nature of justice, the relation between law and morality, and a few others, from the point of view of African philosophy of law, have received less and insipid attention in western literature.

This paper is actuated by the need to foreground the contributions of African legal philosophy on the Separability-Inseparability controversy. The question is: is African legal theory receptive to or has an aversion towards positivism and the Separability thesis? What picture of the relation between law and morality can we ferret out from the tenets of African jurisprudence? While it is true that positivism enjoys an unparallel popularity in jurisprudential discourse, its insistence on the Separability thesis has been flawed by a lingering sense of dilemma. This dilemma consists, in our opinion, in the insistence on the inviolability of legal validity, on one hand, while admitting, on the other hand, the reality of a moral scrutiny of law, legal standards and the actions of legal officials.

Evidently, it seems correct to say that the barrage of criticisms and questioning against the Separability thesis affords an independent basis in the request for a conceptual, pragmatic, and existential reconsideration. A reconsideration of the Separability thesis, given a cultural background, approach or perspective, is not a misnomer. A re-examination is undertaken here within the context of African legal theory. The basic question this paper seeks to provide answers to is whether the Separability thesis is compatible with African legal theory. Based on inevitable results and arising from the nature of African philosophy of law, the claim of the paper is that there is an incompatibility between positivists Separability thesis and African legal philosophy.

The paper is divided into three sections: the first section is devoted to a critical and reflective analysis on the several dimensions of the Separability-Inseparability controversy. The second section is a comprehensive argumentation on the Separability thesis within the context of African legal theory. The last section is the conclusion of the essay.

---

1 Trevor-Roper 1964:9; Foote 1854:207.

2 Taiwo 1998 <http://www.clas.ufl.edu/africa/asq/legal.htm>.

## 2. The separability-inseparability controversy: A synopsis

Contemporary Anglo-American legal positivism is divided between the exclusivists and inclusivists over the relation between law and morality or what is famously called the value thesis.<sup>3</sup> The exclusivists<sup>4</sup> subscribe to the separation thesis while inclusivists<sup>5</sup> are inclined towards the more conventional, traditional name, courtesy of H. L. A. Hart, called the Separability thesis. The former says law and morality are necessarily separated while the latter is of the contention that law and morality are not necessarily connected. According to Jules Coleman, the questions that both theses pay attention to are different in terms of their logical strength.<sup>6</sup> In the opinion of 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.<sup>7</sup>

From the outset, a very good defence of positivism in general has been that the value thesis is generally misunderstood by critics. This misunderstanding, it is said, account for both the success of positivism as a legal theory and the diminished status of rival legal theories.<sup>8</sup> It is, therefore, advised that legal theorists should explain very carefully what they mean by legal positivism.<sup>9</sup>

In our estimation, the internal division between exclusivists and inclusivists over the value thesis can be attributed, not to grave misunderstanding of what positivism is, but to two main factors: one, the long history of emendations, revision, clarifications and inconsistency over the value thesis both by historical and contemporary actors in the positivists drama troupe, namely Hobbes, Hume, Bentham, Austin, and principally, Hart; and two, the history of external attacks from enemies of positivists' value thesis. Careful reading shows that each of the factors has serious implications, both historical and logical, on the acceptability of the value thesis. Little reflection is needed to make this clear.

In the first instance, while the thesis of exclusive positivism consists in the view that laws do not necessarily produce or satisfy the demands of morality, inclusive positivism hacks on the fact that laws reproduce certain demands of

---

3 Kent Greenawalt, for example, is of the opinion that the social thesis is logically prior to the value thesis. In his view: "if one had to settle on a central aspect of legal positivism, as a general approach to legal theory that has existed over time, one would focus on the premise that law is in some important sense a social fact or set of social facts. Suppositions about the connections between law and morality and about the nature of judicial decisions follow from that." See Greenawalt 1996: 19.

4 Exclusive positivism is ably championed by the thoughts and writings of the following: Shapiro 1998:469-508; Marmor 2002; Leiter 1998:533-547; Raz 1979:46.

5 A number of scholars, within the positivists' tradition, have pledged their unflinching support for legal positivism while at the same time admitting what Michael Stocker regarded as a kind of schizophrenia of positivist legal theory. See Stocker 1976:453-465. Notable among inclusive legal positivists are Coleman 1982:139-164; Coleman 1998:381-426; Waluchow 1994:129-140; Soper 1977:473-519; Lyons 1977:415-435; Hart 1994:250-54.

6 See Coleman 1996:290.

7 Waluchow 1998:6.

8 Waluchow 1998:2.

9 Greenawalt 1996:19.

morality. The basis for the adoption of inclusive legal positivism consists in the Hartian rejection of the Value Thesis which states that laws do not necessarily have moral value<sup>10</sup> and a later acceptance of the Moral Value Thesis which is the view that laws necessarily have moral value.<sup>11</sup>

In the second instance, inclusive positivism is based on the perceived implausibility in exclusive legal positivism. According to Jose Juan Moreso:

ELP provides an unsatisfactory picture of the law. Provided that constitutions in contemporary democracies often resort to moral standards, judicial discretion would be, in these cases, quite pervasive. Therefore, it might seem preferable to work out, if possible, some different, though plausible, interpretation of the Hartian legal positivism theses.<sup>12</sup>

Proponents of inclusive legal positivism hold very different interpretations of the value thesis while not detaching themselves and their views from the spirit of positivism. What is regarded as excellently capturing the spirit of positivism is the Social Thesis which is the view that law is a product of social facts, or, as pungently articulated by Torben Spaak, that what law is and what it is not, is a matter of social fact.<sup>13</sup>

Whether inclusivism is consistent with the spirit of positivism, given different interpretation of the value thesis, is of urgent importance. A denial, however, of the Social Thesis, apart from reducing the appeal of the value thesis, also has the added possibility of weakening inclusivism. Waluchow and Coleman can be regarded as holding what may be called the particularistic thesis against the value thesis. According to inclusive positivism, it is possible that there exist some particular legal systems in which the criteria of legal validity include moral ones. If this is correct, then it falsifies the exclusivists claim that moral factors are not part of the criteria of legal validity. Thus, particular legal systems may exhibit some moral criteria in the definition of law even though that does not suggest that there is a necessary relation between law and morality nor does it establish that there is a moral content to a legal rule. As defended by Waluchow:

Philosophers like Jules Coleman, John Mackie, and David Lyons have suggested that among the conceivable connections between law and morality that a positivist might accept is that the identification of a rule as valid within a legal system, as well as the discernment of the rule's content and how it bears on a legal case, can depend on moral factors. On this view, which we have called inclusive legal positivism, moral values and principles count among the possible grounds that a legal system might accept for determining the existence and content of valid laws ... Despite a noticeable trend among positivists toward accepting that law and morality can be connected as inclusive positivism suggests, there are clear exceptions.<sup>14</sup>

---

10 Morauta 2004:124.

11 See Hart 1994:206-207.

12 Moreso 2000.

13 Spaak 2004:257.

14 Waluchow 1994:81-2.

According to James Morauta, the thesis of exclusive legal positivism is the view that for any possible legal system, the rule of recognition in that system contains only non-moral criteria.<sup>15</sup> The implication is that the existence of any legal system is not responsive to morality. This interpretation of legal positivism derives from positivists' initial position on the nature of law. This is what some positivists regard as the Social Thesis which is the view that what counts as law in any given society is a matter of social fact. According to Horton, positivists understanding of the Social Thesis consist in the view that:

[T]he question of what the law is in any given society ultimately reduces to questions of social facts, i.e. facts concerning the existence of institutions within the society, and the behaviour and attitudes of the members of the society.<sup>16</sup>

At first glance, this thesis is not a conceptual one. It is, to be precise, a descriptive, empirical contention. The truth or falsehood of this contention will doubtless lie not in conceptual verification but in an empirical one. However, it might be argued that just a single instance of a legal system in which moral considerations serve as the criterion of legal validity reduces the potency and soundness of exclusive positivism. According to Waluchow:

Exclusive positivism, in both its conceptual and descriptive forms, is falsified by the existence of legal systems in which determinations of law sometimes depend on moral factors. It is perhaps worth noting that even if it were true that there were no such systems, this would not invalidate or falsify the conceptual version of Inclusive positivism.<sup>17</sup>

Judged rightly, it will amount to logical inconsistency to accept exclusive positivism's social thesis and yet admit that moral criteria are indispensable constituents in the determination of law. The insistence of exclusive positivism is that moral obligation is secondary to law. What is primary is the internal point of view which is exactly what creates the binding nature of law. That is, the basis of obligation to law stems from law, and not from morality.

In contemporary legal positivism, exclusive positivism is ably represented by Joseph Raz. According to Raz, "the existence and content of every law is fully determined by social sources".<sup>18</sup> The implication is that moral criteria can neither be sufficient nor necessary conditions for the legal status of a norm. A possible worry over the claims of exclusive positivism, in our view, is whether hard positivism is able to sustain the argument that moral criteria are not necessary and sufficient conditions for the legal status of a norm. One could maintain a contrary line of argument showing that exclusivism is bound to fall just in case it is possible to cite an example of societies where part of the social sources of law are moral criteria.<sup>19</sup>

---

15 Morauta 2004:117.

16 Horton 1998:609.

17 Waluchow 1998:7.

18 Raz 1979:46.

19 This point is very important in the reconsideration of the Separability thesis within the context of African legal philosophy. Max Gluckman's research on Barotse jurisprudence

Morauta hinted at such a possibility. According to him, to define law as fully determined by social sources depends on what is meant; and what is meant could be broadened to include, in social sources, moral criteria. This meaning, however, can be established only as a *conjunctive thesis* since the initial, original position on the sources of law is still maintained. The *conjunctive thesis* was adopted by Morauta to establish a note of triumph for positivists' position on the separation thesis. But this is, however, possible if and only if the conjunctive thesis is formulated derivatively, and not, definitionally. The Social Thesis and the conjunctive thesis affirm the position that laws are social facts although those facts include moral values which are part of the social facts prevalent in that society.

The derivative argument for the Social Thesis will then mean that:

moral premises P1, P2 ... Pn are true and such that: the social facts which are the truthmakers for legal propositions entail — in conjunction with true premises including P1, P2 ... Pn — that laws necessarily have moral value.<sup>20</sup>

Once this is so, argues Morauta, positivism can be defended along the line of the Social Thesis.<sup>21</sup>

Even though the argument by Morauta sounds convincing, a positivist like Raz is expected to have problems with this understanding of the Social Thesis. According to Raz, understanding the Social Thesis along the line of the conjunctive thesis is to sound like a naturalist. For Raz, there is a clear cut difference between moral premises for law and what are distinctive legal premises. When the Social Thesis is mentioned, argues Raz, what is argued to be important for law and legal systems is that laws are fully sourced in social facts and those facts are basically legal premises.<sup>22</sup>

In fact, Raz argued that the thesis of inclusive positivism is bound to fail in the sense that if legal rules are pre-emptive reasons or exclusionary reasons, there is no reason why moral values will be brought to play.<sup>23</sup> A regime of laws or a legal system is a justified practical authority. Those subject to an authority such as law "can benefit by its decisions only if they can establish their existence and content in ways which do not depend on raising the very same issues which the authority is there to settle".<sup>24</sup>

The acceptability of Raz's argument above only shows the prodigality of inclusive positivism right from the outset. The need for an inclusive thesis all along was bound to fail. However, if an endorsement of inclusivism in contemporary

---

is evidently illuminating since it proves that, in Barotse Jurisprudence, the determination of law is inclusive of moral criteria. This is what Gluckman calls the "the laws of natural morality and of nations, and good morals and public policy." See Gluckman 1967:231. In the same vein, Idowu and Oke also emphasise that there exists a conceptually complementary relationship between law and morality in African cultural jurisprudence. See Idowu & Oke 2008:151-170.

20 Morauta 2004:126.

21 Morauta 2004:126.

22 Raz 1975:166.

23 Raz 1994:199-204.

24 Raz 1994:219.

positivism is an incredible instance of prodigality, what is curious in the consideration of contemporary legal positivism is when the prodigality is found in the source. Since the source is said to provide the original position, it may serve us better if the statement of exclusive positivism is reconsidered; for in it may be found the prodigality it has found in others.

Raz's exclusivism, no doubt, is open to criticisms in some obvious senses: one, it is true that legal rules are meant to be authoritative and indeed they are, but then, even at that the content of legal rules and legal systems may be determined in part by moral reasons;<sup>25</sup> two, according to Jules Coleman, the possibility of a distinction between moral criteria for legal validity and moral reasons that apply to citizens in a given system renders unworkable the claims of Raz that the authority of law is justified practical authority.<sup>26</sup>

A more fundamental objection to Raz's exclusivism was offered by Jeff Goldsworthy. According to Goldsworthy, Raz's view that officials of a legal system only accept a law as morally binding because it is legally binding is self-defeating. Raz argued that officials only accept a law as morally binding because it is legally binding. But though they believe this, they often do not think that that is the way in which legal obligation is to be held. This is true, according to Raz, in the sense that:

[I]t may be that all they state is that certain relations exists between certain people and common legal sources or laws. Their belief that those relations give rise to (moral) obligations may be quite separate and may not be part of what they actually say when asserting obligations according to the law.<sup>27</sup>

In another passage, Raz also tended to show a bit of inconsistency in the whole argument of exclusivism.

The general conclusion on the appraisal of exclusivism is that law is a social institution. Their intelligibility and meaningfulness can be deciphered by the fact that they incorporate certain values which make the officials constrained in a moral way in enforcing and implementing them. The basis for acceptance may not necessarily be moral criteria of validity. However, there could be an implicit acknowledgement of the moral quality of the ends of law. This important point was stressed by Neil MacCormick when he reasoned that:

It is as true of law that justice and the promotion of public good within the constraints of justice are the particular goods that make it intelligible to us as a congeries of institutions and practices ... It is thus the case that laws we judge unjust or detrimental to the public good are on that very account laws that we judge essentially defiant examples of the genus to which they belong, even though we may also judge them to belong validly to that genus.<sup>28</sup>

---

25 Waluchow 1994:129-140; see also Waluchow 2002:47-71.

26 Coleman 2001:125-127.

27 Raz 1984:131.

28 MacCormick 1992:113.

The evolution of inclusive and exclusive positivism over the value thesis is not just traceable to Hart's reformulation and revision of the tenets of legal positivism in the postscripts but also Dworkin's critique of Hart. Daniel Priel's observation appears illuminating. In his words:

The beginnings of the debate between exclusive and inclusive legal positivists can be found in the responses offered by different theorists to Dworkin's arguments against legal positivism. Very roughly, Dworkin argued that morality plays an essential and non-discretionary role in legal reasoning, and from that it follows that at least some moral standards are necessarily part of the law. In addition, he argued that since these moral standards are not part of the law as a result of some 'pedigree' test, positivism is false.<sup>29</sup>

Less pretentiously, Hart saw in the Separability thesis the need for a reformulation and revision even though, like Austin, he saw the merit in insisting on the Separability thesis. Reformulating the language of the Separability thesis, Hart recapitulated that:

[W]hat Bentham and Austin were anxious to assert were the following two simple things: 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 conversely, it could not follow from the mere fact that a rule was morally desirable that it was a rule of law.<sup>30</sup>

But then, what occasioned the revision and reformulation of the language of the Separability thesis? What implications do they hold for the Separability thesis? It appears that naturalist's critique of positivism and the Separability thesis is an important factor in positivists' reformulation of the Separability thesis. Clearly, Hart's position is an engagement in inconsistency simply because he seems to have assumed the possibility of two positions at the same time with respect to morals and the law when he contended that "it could not follow that a rule violated standards of morality that it was a rule of law" or the statement that "it can be claimed for the simple positivist doctrine that morally iniquitous rules may still be law"<sup>31</sup> and yet concluded that such a rule is still the "law but too iniquitous to obey or apply".<sup>32</sup>

D'Amato was very apt in his observation when he contended that legal positivism seems to be ensnared in a moral dilemma over the Separability thesis. According to D'Amato:

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.<sup>33</sup>

---

29 Priel 2005:675.

30 Hart 1957-58:599.

31 Hart 1961:207.

32 Hart 1961:207.

33 Anthony D'Amato 1985:1.



Positivists' answers have not been duly satisfying; they involve elements of assertive insistence on separation on one hand, while admitting the factuality and possibility of injustice on the other. While this dilemma is factually noticeable in the analysis of most positivists, it tends to serve another function: that of weakening the tenacity and strength of the Separability thesis. According to Hart, the language of the Separability thesis consist in 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".<sup>34</sup> However, in another light, Hart, reacting to the possibility of injustice, contended as follows:

What 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.<sup>35</sup>

Evidently, therefore, there seems to be a modicum of moral dilemma in the Separability thesis as advocated by legal positivist. The dilemma arises from an engagement in circularity whenever questions of moral obligation to the law are raised. This observation is also in line with other naturalists' critique of positivism and the Separability thesis. Finnis contends that:

the programme of separating off from jurisprudence all questions or assumptions about the moral significance of law are not consistently carried through by those who propose it. Their works are replete with more or less un-discussed (moral) assumptions.<sup>36</sup>

We can ascribe to naturalists' thesis a claim of presumptive credibility. But this presumptive credibility must not be allowed to flourish in the court of misunderstanding of positivists' thesis of separation nor scope on some ambiguities in the interpretation of legal positivists' thesis. In this light, one general defence of positivists' separation thesis is that many of the attacks on legal positivists, such as that it endorses an attitude of conformism,<sup>37</sup> or that it asserts some version of "might makes right"<sup>38</sup> or that the separation thesis entails a kind of schizophrenia of positivist legal theory,<sup>39</sup> arise from a kind of confusion in the reading of legal positivism, in the sense that such interpretations, apart from bordering on conceptual confusion, consist in conflating what is said and what is implicated.<sup>40</sup>

Thus, it is possible that the presumptive credibility ascribed to naturalism is not a sustainable thesis just in case that it trades on certain misunderstanding and misinterpretation of what legal positivists' separation thesis means. What

---

34 Hart 1961:181.

35 Hart 1961:206.

36 Finnis 1980:358-9.

37 See Jori 1998:515.

38 Bix 2005:31.

39 Stocker 1976:453-465.

40 See Horton 1998:599.

is often appraised about positivism and its separation thesis depends on the conceptual parameters used in such appraisal.

If our observation is acceptable, it is rightly contended that what naturalists and positivists are disagreed upon consists in whether it is possible to sustain an attitude of obligation where it is the case that a law that actually exists is truly unjust. It can therefore be said that the naturalist assessment of the positivists' thesis is not a trade on what is said and what is implicated, but rather a case of what is meant. The greatest undoing of positivism with respect to the Separability or value thesis, going by its historical development, is what George Letsas defined as the tendency towards "excessive pluralism" of ideas and "theoretical fragmentation of detailed analyses". In his words:

Legal positivism — of which Hart was the major exponent — has been variously evolved and significantly refined in many respects and by many followers. But at the same time legal positivism shows signs of an excessive pluralism and a theoretical fragmentation of detailed analyses, so much that nothing we can say about legal positivism in general can be agreed to by all positivists. Inclusive positivists disagree with the exclusives and within each camp, they disagree with each other on the reasons why the opposite camp is wrong.<sup>41</sup>

Having examined closely both the historical development and the logical structure of positivists' Separability thesis, the question then is: is the Separability thesis compatible with the substance of African jurisprudence? A major hurdle, one must quickly add, is how to make meaning out of the scanty analysis that exists amongst some African jurists. In every respect, J. G. Riddall's observation becomes very crucial and important. According to Riddall:

so closely may law and morality be intertwined that in some societies the two may be regarded as not forming separate notions. In the societies of the western world, however, the two spheres have generally been seen, notwithstanding the numerous interrelationships, as concepts that are distinct.<sup>42</sup>

From the perspective of what may be branded as compelling cultural reasons, it is argued that, by and large, positivists' Separability thesis is incompatible with African philosophy of society and, to that extent, a non-existent doctrine.

### 3. African jurisprudence and the separability-inseparability thesis

From an African perspective, positivists' Separability thesis could be interrogated from a myriad of interesting positions. Nevertheless, a word or two is necessary on the main thesis of African jurisprudence. Very early attempts to define the nature of African jurisprudence can be summarily sketched. Fidelis Okafor, while

---

41 Letsas 2000:187.

42 Riddall 1991:295.

trying to debunk an extreme position<sup>43</sup> seems, in my opinion, to have assumed another extreme position when he contended that the theoretical framework, the philosophy underpinning African legal system, was not in place. The latter position, if taken, only demonstrates that Africa never had a philosophical orientation during the days before colonialism. This position is dangerous to the several arguments by African philosophers that philosophical heritage of Africa existed even before colonialism. Contrary to Okafor, that heritage had philosophical content, jurisprudence inclusive.

An attempt here, however, is not a misnomer. D'lamini, in a provocative, though apologetic article, contended that "Africans have traditionally held a theoretical attitude towards their government".<sup>44</sup> He, however, did not define the nature of this theoretical attitude. As a matter of fact, Teslim Elias, from whom D'lamini's thoughts derived compelling inspiration, was equally silent on what the nature of the theoretical attitude that Africans adopted towards law in their societies.

This did not, however, detract from the inspirational and motivational attempt by Elias to contribute to the project of African renaissance. Connoting abstract linguistic correspondence, Elias retorted that:

[I]t would be difficult for Africans to have continued to enjoy the progress they have even in the face of civilisation if they could not think and feel about the interests which actuate them, the institutions by means of which they organise collective action, and structure of the group into which they are organised.<sup>45</sup>

John Murungi, while giving a thoroughly and truly hermeneutic definition of African jurisprudence, failed to identify what Africans hold as the exact philosophy underlying their conception of law. Murungi's work is more of an interrogation rather than a conceptual and critical analysis; a reflection on the question of existence rather than an articulation of the substantive thesis of the nature of African jurisprudence. In the end, one can only say that his work is a critique of Separability or separation thesis of another kind: the separation of African jurisprudence from the rest of jurisprudence. In his words:

Each path of jurisprudence represents an attempt by human beings to tell a story about being human. Unless one discounts the humanity of

---

43 The position that Africans had no laws, no history, no religion, no civilisation before colonialism. This view is commonplace not just with respect to African law but also the whole project on the nature of African identity. Professor Roper, the Oxford Historian in 1962 contended that: "Perhaps, in the future, there will be some African history to teach. But at present there is none: there is only the history of Europeans in Africa. The rest is darkness ... and darkness is not a subject of history", Trevor-Roper 1964:9. On the issue of African identity, Nancy Stepan noted that the fundamental question on the nature of African identity, which is actually rooted in the development of racists stereotypes, is that even though the Negro was physically freed by the Emancipation act of 1833, till today, the British mind is still a colony and asylum in which the African is mentally, morally and physically a slave. See Stepan 1982:1. It is this sort of mindset that influenced the notorious remark that Trevor Roper made about Africa as noted above.

44 D'lamini 1997:70.

45 Elias 1963:17.

others, one must admit that one has something in common with all other human beings ... what African jurisprudence calls for is an ongoing dialogue among Africans on being human, a dialogue that of necessity leads to dialogue with other human beings. This dialogue is not an end in itself. It is a dialogue with an existential implication ...<sup>46</sup>

Attempts at transcending this initial difficulty occasioned serious reflection among African philosophers that defining law in Africa would ultimately rest on the conception of the African self. It means that what is at stake actually centres on the definition of the self. Unlike Hume who contended that the self is a fleeting sense of perception, many African writers have in one way or the other projected the nature of the African self. Taken from this standpoint, it is often concluded that the nature of the African self is clustered in the imperative of history. Pictographically, it follows that the foundation of jurisprudence in Africa is not about mere abstract theorisation nor is it informed by the agency of mere speculation; it is all about who we think we are. In the opinion of Korsgaard, it is all about constructing ourselves.<sup>47</sup>

In what ways therefore can we conceptualise the nature of African jurisprudence and what is the implication of that thesis for the Separability thesis? I have argued in several works<sup>48</sup> on what I perceive to be the theoretical attitude that Africans hold on the nature of law in African society. In a separate, though complementary passage, Desmond Tutu, very perceptively, also hinted at a concept that provides the intellectual character of African law. Because of the possibilities of cultural pluralism, African societies do not subscribe to retributive justice but restorative justice. Reflectively, therefore, African jurisprudence can be defined in terms of the reconciliation thesis.<sup>49</sup>

But then, why is this regarded as the heartbeat of African jurisprudence? If this is the general character of African conception of law, why is the Separability thesis an incompatible thesis? In what follows, I adduce some grounds for the claim that positivists' value thesis needs reconsideration in the context of African legal theory. The compelling grounds for this claim are discussed below.

The first reason is what has been stated quite summarily above which is the view that African philosophy of society from which its jurisprudence derives is one that is reconciliatory in nature. In Yoruba legal culture, for instance, parties to a suit left Yoruba courts neither puffed up nor cast down — for each a crumb of right, for neither of them the whole loaf.<sup>50</sup> In such a legal culture, law and morality assumes a complementary role in achieving the goal of social cohesion and equilibrium. Where none is entitled to the whole and none goes empty handed, it is significant to state that law in such a society is not derived solely from social facts. Moral, cultural conventions are intertwined into the nature and understanding of law.

---

46 Elias 1963:525.

47 Korsgaard 2002.

48 For few examples, see Idowu 2006:1-16; Idowu 2003:63-89; Idowu 2004:1-27; Idowu 2004:52-93; Idowu 2006:34-48.

49 Idowu 2006:1-16.

50 Elias 1958:4.

Secondly, Africa seems to have entrenched in its cultural life a humanist ideology one which elevates the generic essence of human existence. Humanism is both a philosophy as well as an existential charter. But it is first an existential charter before its assumption of a philosophical character. As a philosophy, it may be regarded as ideological in nature. But then as argued by Miguel de Unamuno, "one philosophises in order to live not live in order to philosophise".<sup>51</sup> The implication is that humanism, from the existential point of view, is a reflection of what holds man and what man holds in society. This is the case putting into view what existentialists call "the tragic realities of life".

In the secondary sense, humanism turns into a philosophical (ideological) charter with respect to man's place in the universe. Humanism is therefore both a factual and normative doctrine. It is factual because it is about man, an existing being (a being-for-itself in the language of Sartre), and also, a normative thing because it stresses the pursuit of man as an existing being. Even though understood and defined, historically, in many different ways, in general, humanism is the doctrine of, concerning and about man. Alf Ahlberg, a Swedish philosopher, defines humanism as an ideology which postulates as a belief the superior value of the human being.<sup>52</sup> Simply stated, it means man is the creator of values and that ultimate value is about man and his place in the universe.

Humanism, from this point of view, mutually excludes some extreme measures often adopted in interpreting and understanding man and his place in the universe. For instance, it is only a contradiction although not an impossibility to claim to be a humanist and also endorse any form of racism. Again, it would amount to a very strange belief to be a humanist and not believe in the relevance of a moral outlook even if those moral outlooks may not necessarily be transcendental or celestial in nature. A society that adopts a humanist culture, of course, will hold a limited conception of science; science, in such a culture, may not be the sole determinant of all knowledge nor will it ever be elevated to an omnipotent status. Just as Unamuno reasoned about philosophy, it may equally follow that science is for man and not man for science. After all, science should be regarded as the handiwork of man, by man and for man.

A purely and truly humanist society cannot but be taken in the holistic sense. This is what is meant when the worldview inherent in such a culture is described as all-encompassing. A humanist society is, in normative terms, an inclusivist society. African humanistic orientation exalts and elevates what can be called the principle and the necessity of hierarchy of values than the principle of neutrality. It follows that a theory of law which sees science as the major determinant of value and knowledge limits essentially the pride of a truly humanist society. Since humanism is about man it means it is an attempt to protect, project and pursue the needs, interests and desires of man which includes moral needs also as well as other needs.

Moral needs are, sometimes, expressible in notions of justice, the general good and what Aristotle calls the pursuit of happiness *eudemonia*. These are, at least, tolerable concepts within the context of humanist culture. It follows

---

51 For details, see Solomon & Higgins 1996:268.

52 Ahlberg 1992:7.

that, if our interpretation of humanism is right, and the thesis holds for Africa, it is conclusive that positivist's value thesis is not an accommodated principle in African jurisprudence. This derives and flows from the premise that positivists' Separability thesis is essentially an attempt to construct a science of law which is completely free from value and normative considerations. Positivism is humanism deflated and debased. Wiredu's timely observation that "it would profit us little to gain all the technology in the world and lose the humanist essence of our culture",<sup>53</sup> to me, is a valid supporting argument why the Separability thesis is incompatible with African legal theory.

And what is more, African jurisprudence is based on the principle of solidarity. This principle essentially derives from the reconciliatory philosophy earlier alluded to. The principle of solidarity makes meaning within the context of a moral milieu. Its significance derives from what Julius Nyerere calls the philosophy of Ujamaa i.e. the unbroken bond of mutual relatedness. Ackah's construction of what animates the African Diaspora as the "quest for identity"<sup>54</sup> with the rest of Africa is suggestive of the principle of solidarity. The principle, in relation to Africa, is therefore twofold: it is first regulative and, also, interactive.

The principle of solidarity is an affirmation of the "we" and a rejection of the sovereignty of the will (the basis of the coercive, positivistic theory of obligation), which is actually the source of the positivists' ideology that law is to be understood from the point of view of science. Apart from being an affirmation of what Joe Teffo calls "the source of innovative reconstruction"<sup>55</sup> in Africa, the principle of solidarity is also a rejection of the imperial magisterial status, the unmitigated authoritativeness and the doctrine of conformism which is itself an aspect of the *reductio ad Hitlerum*<sup>56</sup> often ascribed to the nature of law in Positivists' jurisprudence. Raz's conclusion that law is justified practical authority, meaning an embodied source of integral authority outside morality, is an aspect of adversarial jurisprudence and politics which undermines, in the opinion of Ramose, the principle of solidarity for which Africa is known.<sup>57</sup>

Also, the Separability thesis would be a complete ridicule in culturally plural society where it is assumed that diversity implies the presence of many worldviews. A cultural rejection of the Separability thesis within the context of African jurisprudence is premised on what scholars such as Austin Sarat,<sup>58</sup> David Howes,<sup>59</sup> and Nicholas Kasirer<sup>60</sup> have variously tagged cultural or cross-

---

53 Wiredu 1980:21.

54 Ackah 1999:61.

55 Teffo 2004:445.

56 This conception of law is not often entertained in some African societies such as the Yoruba. The different attitudes to this conception of law constitute the basis of some of the wars that transpired in Yoruba societies before the era of colonialism. At best, those wars were attempts to express limits to and checks and balances on the powers of the monarchs or leaders in such societies. See, for comprehensive details, Idowu 2005:49-66.

57 Ramose 1992:75.

58 Sarat & Kearns 1998.

59 See Howes 2005:9-29.

60 See Kasirer 2002.

cultural jurisprudence. Cultural jurisprudence or cultural justice system can be simply defined as one that recognises, 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.

From the tenets of cultural jurisprudence, it behoves us to state that the Separability thesis may not be found compatible in a multicultural society especially where the issue of cultural rights<sup>61</sup> or justice seems to be a contentious issue. Some of the conditions necessitating a resort to or the claims for cultural equity could, perhaps, be due to the absence of true justice in a centralised legal or justice system especially in a multicultural society. In evident terms, most societies in Africa are plural an indication that the possibility of cultural equity and justice may be remote. This is always the case where one of the ethnic group exercises monopoly over others in political and legal matters.

For example, the orientation towards Shariah in Northern Nigeria was necessitated, in part, by the over centralisation of the legal system by the Nigerian State, and partly, also, to the undue Anglicisation of the central legal process in Nigeria. Since Shariah is an aspect of the cultural and religious life of the Northern part of Nigeria, which professes allegiance to the Islamic faith and culture, the introduction of Shariah into the Nigerian legal system is premised on the need to ensure equity and justice in the treatment of the cultural life under which the North professes its allegiance.

One of the criticisms against the Shariah in Nigeria is that it creates a dual legal system in the country. But, as Fatula and Adeyemo submitted in their reflection on Shariah in Nigeria, that argument is too weak to vitiate the validity of the Shariah claim. In their words:

Britain, in spite of her unitary political system has, alongside the English Law, the Scots Law whose origin and development differ from those of English Law. Accordingly, Scotland has her own system of courts quite separate from and independent of the English courts with the House of Lords as its final court of Appeal. That being the case, we submit that there is nothing wrong or strange if Nigeria, a plural federal state should operate dual legal system.<sup>62</sup>

Incidences such as these often project 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. The challenges of cultural pluralism enervate the possibility of the Separability thesis within the context of African legal theory. In terms of

---

61 Cultural rights as defined and published by the United Nations Department of Public Information DPI/1627/HR-March 1995 states that "every human being has the right to culture, including the right to enjoy and develop cultural life and identity. Cultural rights, however, are not unlimited. The right to culture is limited at the point at which it infringes on another human right. No right can be used at the expense or destruction of another, in accordance with international law."

62 Fatula & Adeyemo 2004:45.



definitions, the Separability thesis collapses the uniqueness of each cultural contribution to a serving legal system.

Some have also suggested that the democratic character of the African past makes it impossible to regard the Separability thesis as a compatible doctrine in Africa. The essence of democratic culture consist in the prevalence of a culture of social justice, principles of participation and accountability meaning, in the first sense, participation by the people, and two, accountability to the people. In every sense, therefore, democracy is a system of government that promotes the ideal of justice. It means that democracy endorses the view that one of the ways in which state actions are regulated, assessed and evaluated includes the moral framework promoted through a justice system. It follows that it is anti-democratic for laws and actions of state actors and agents to speak of injustice. Relevantly, democratic culture informs us on how the lives of citizens are ordered, how citizens interact with one another, and how they relate with the state and its structures.

Democratic governance, therefore, entails more than the institutions of state: it also includes the strategies, tactics, and knowledge that underpin the state and inform political action. Many citizens have legitimate expectations that one of the dividends that should flow from democratic governance is the facilitation of access to a broad range of social services. So too do they demand that the democratic state which they help to bring about through their struggles should also be socially inclusive, responsible and representative.

In whatever way the term may be grasped and employed, democracy cannot flower and endure if it is not founded on social justice, it being understood that in every political system, social justice is integral to the articulation and exercise of citizenship rights. The requirements of justice have dual significance: one is conceptual and the other normative. Conceptually, the requirements of justice for any democracy is an indication of the nature of a true democracy while the normative significance of the requirements of justice shows that democracy is not just any kind but a moral style of governance; justice provides the litmus test for what is expected in a true democracy.

Since justice is a basic requirement of democracy, it shows that in a democracy laws bear out the nature and significance of accountability, an essential ingredient of democracy. Accountability establishes moral responsibility showing the possibility of moral culpability. Just as it shows that citizens respect laws it also shows that laws are not made in defiance of rights, liberties and moral interests and pursuits. In other words, in a democracy laws are made within prescribed limits. Justice in a truly democratic setting is a *sine qua non*. It is within the aura of justice that citizenship rights and responsibilities are achieved, actuated and attained. It is that which explains the generic essence of a democratic society; where it starts and where it ends the journey. Social democratic justice explains the basic social relations that underpin economy and society, the social contract between state and society, the welfare concerns of the generality of the populace, the rights of minorities and indigenous peoples, the rights of women, gender equality, and protection for children and vulnerable groups.



A veritable aspect of African democracy and its judicial and jurisprudential character is the heavy democratic reliance on the institution of chiefs and traditional rulers. It means the democratic ferment and flavour in most traditional African societies is based on the kingship or monarchical model. This, however, does not make African democracy less democratic. Democracy is both moral and legal in outlook in which both function quite effectively in defining its essential character and success altogether. It is quite antithetical to the spirit of democracy to have the separation of law and morals.

If Africans never had the consciousness towards the conception of democracy, it would have been impossible engaging in a reflective critique of what is sold to African populace as western democracy today. For Africans, the impossibility or incapability of Africa sustaining democracy centres on the structures set up by the colonial order which ended up forming the foundation of the present African state. And if the foundation indeed be destroyed what can the African do? The foundation of African democracy was a moral foundation. The foundation of jurisprudence was essentially built around this ideal, a fact which compels us to argue that African jurisprudence, from the point of its democratic ferment was incompatible with the Separability thesis that law and morality are to be held separable.

In recent times, scholars have been engaged in a serious intellectual debate over what is considered to be a salient description of the African cast and the significance of that description to the totality of our definition of African philosophy of society. It is believed that Africa was and still is (except perhaps for the reeling influence of modernism courtesy of science and technology) a heavily communal society. In the light of recent thoughts, this refers to the libertarian-communitarian controversy that could be described as having a stagnating impact on western philosophy.

This aspect of African life, if actually true, must be seen to have serious implications on the kind of political, economic and legal structures existing in such a society. But then, what is important here is actually not the implication but what it means to say that Africa is a communal, communitarian or, in the words of Senghor, "a community society"<sup>63</sup> or that it endorses the communitarian philosophy. What is special and different about Africa's brand of communalism? How does this fact of African life influence our interpretation of its jurisprudence?

Scholars are divided over whether communitarianism is a unique African attribute. Even those who think that communitarian ideology is not an African invention however think that African communalism is not on the same ontological and epistemological bearing with what holds elsewhere, especially the western world.<sup>64</sup> What, however, divides those who think in the latter terms consist in fashioning and understanding the elements that makes African

---

63 Senghor 1964:94.

64 Examples are replete. Many of these scholars such as Wiredu, Gyekye, Appiah, Odera Oruka believe that the basis of difference, in theoretical terms, is traceable to the emancipatory politics of independence from European colonialism. But, as a practice, Masolo notes that its entrenchment precedes the politics of nationalist struggles and stretches to the distant past before any encounter with the West. See Masolo 2004:493.

communitarian philosophy different from what obtains elsewhere in the world. Two major thesis or theory can be formulated here: the Nationalist (Political) thesis and the Existential (Ontological) Thesis.

The Nationalist thesis was influenced by the ideological struggles for emancipation in Africa. It is, from all indications, a political formulation. The basis of the thesis is that colonialism constituted a breach on the African self and was, in totality, a psychological dislocation. To cut away from that negative influence was to fashion an ideology that was completely at odds with colonialism and that was in line with African indigenous philosophy. That ideology, for most of these African thinkers such as Nyerere, Nkrumah, Senghor, Cheikh Anta Diop, and a host of others, can only be fashioned by reflecting on the values of Africa's indigenous living histories and social structures. This was thought to be different from the capitalist elements prevalent in Europe and that eventually gave birth to colonialism. What was regarded as Africa's "living history" ended up being defined in terms of the African and the practice of communal feelings and belongingness. As a political ideology, the fundament of this thesis ended up in the popular notion of African socialism.

But then two essential problems can be stated concerning this thesis in terms of how genuine it is in stating the nature of African communitarian philosophy. One, it was not too clear whether nationalism was actually successful in creating a different style of life for Africa and Africans since, it appears very clear that, most of the political leaders who ended up being in the confines of power after the demise of colonialism never broke away entirely with the structures invented by colonialism and, more importantly, used the very means adopted by colonialism to repress the people they thought they were agitating a new life for.

Two, African socialism, based on the ideology of nationalism was an unworkable doctrine since there were many interests that divided specific distinct societies in Africa: class, ethnic, religious, educational, interests. Moreover, Marxism, from where the notion of African socialism was partly taken, was still an unworkable agenda in Africa since, one, truly in the words of Senghor, it places more emphasis on matter rather than mind; two, its peculiar emphasis on the nature of the ruling class turned out untrue about the ruling class and the class of the capitalist in most African economies. Marxism clearly undermined the grave influence of politics and political power in explaining the basis of economic power; rather, it explains economic power as a basis for acquisition of political power. The central thesis of Marxism, in this respect, and in many other respects, was flawed.<sup>65</sup>

---

65 Arthur Lewis, for instance, believes that Marx's explanation does not capture the African experience since there are only a handful of capitalists and, besides, the government is the largest employer of labour. Class struggles, for him, are not based on Marx's conception of class struggle. See George & Unwin 1965:18-36. In the same vein, Bade has shown the utter limitation of Marx's interpretation of society as it applies to Africa. For him, class formation and identity was not based on the classical conception of the private ownership of capital but in the manipulation of the state for the purpose of wealth accumulation. Onimode 1988:97-125. For Ake, the state itself was a specific modality of class domination enmeshed in class struggle and unable to mediate between competing classes who have the state as the object of attention. See Ake 1989:43-65.

The Existential (ontological) thesis states that the communitarian philosophy in Africa directly derives from African cosmology of life in which everyone, from the essence of generic existence, depends on everyone i.e. the individual depends on the community for their organic existence, an existence that is primarily instantiated in or through being rooted in others in the society. One of the fundamentals of this thesis is that no good society can come about without the efforts of every member of society. From the perspective of taboos, often conceptualised in modern times as the equivalent of laws, Africans reified and created a moral order and system whose epistemology is intricately enforced from the communitarian perspective, for the management of social order and human welfare. Social respectability issued most prominently from communion with others within the framework of social cohesion and harmony.

It follows that individuals are dependent on the social world for their organic needs as well as for their spiritual, moral and intellectual growth. Thus, human well being is a collaborative and reciprocal endeavour. Communitarianism is a moral doctrine and pervades the whole of Africa in its existential reflection of organic existence. As a moral philosophical truth, in Africa, it reiterates the principle of practical altruism as an important social virtue. African communitarian philosophy has been defined as a moral conceptual doctrine called the principle of sympathetic impartiality meaning imagining ourselves emphatically in the shoes of others. According to Wiredu, our cognitive, legal and moral capacities start in the reality of others with whom we enter into association. This construction is solely a humanistic construct since it approaches the African cosmology of life from a purely humanistic paradigm devoid of metaphysical transcendence characteristic of the Scholastics.

Impressively, based on the observed and perceived objections to the nationalist thesis, our sympathies lie with the existential thesis. It does not mean that the existential thesis is an invincible one but that the obvious defects of the nationalists' thesis may not support the foundational basis of the communitarian rejection of the Separability thesis in Africa. But then, what this holds for our consideration of the Separability thesis in the light of African jurisprudence is that once it is accepted as true that Africa subscribes to this brand of communitarian philosophy, it follows that the Separability thesis i.e. the separation of law from morals is an unrealistic outlook in a communitarian world where cognitive, legal and moral capacities are enmeshed in a kind of associational jurisprudence. An associational, communitarian jurisprudence such as advanced here collapses and conflates the legal and the moral in the view that man's capacities are furthered by the irradiation of such gulf. It means that the existential thesis here not only serves as a basis for communitarian ideology but also that the relevant spaces of man's associational life in community are interwoven and intestinal in nature.

#### 4. Conclusion

The programme of separating law from morals undertaken by classical and contemporary legal positivists, no doubt, remains one of the most interesting and challenging debates in legal theory. Interred in that insistence by positivists is the vision of an objective reality behind the nature of law, a reality that positivists have argued excludes the canons of morality. However, apart from the view that objective reality is often viewed to be unreal (a myth)<sup>66</sup> and/or that it is encoded in subjectivity, it is still to be argued and explored in legal philosophy that the Separability thesis, if strictly accepted, invites as a necessary conclusion some absurd implications that, existentially, makes it an unworkable legal dictum. It is from that existential point of view that we have attempted an interrogation of the Separability thesis from the perspective of African legal theory. Existentially, from the perspective of African legal philosophy, law has been and is essentially built on moral criteria. Those moral criteria are part of what defines the society and which makes it to respond to the demands and challenges of the community of men, not of objects. Existence primarily directs our attention to man as a moral and cognitive being. The Separability thesis negates this existential data when viewed from the communitarian perspective from which the African sees the nature of reality.

---

66 Many schools of thought and orientations in philosophy seem to share this central view: Plato reiterates the view that objectivity is not a feature of our present world; it only exists in the world of Forms. On their part, feminist regard objective reality as a myth because what is encoded in the thesis of objectivity, they claim, consist of nothing but the interests of men. According to Ann Scales (1986:1051), "by inquiring into the mythic structure of objectivity, we see that abstract universality contradicts the ideal of a government of laws, not of men". According to Existentialist, objective reality is not an existential possibility since only a divine mind can know ultimate reality. What is presently available to man is what they call the actuality of existence.

## Bibliography

- ACKAH W  
1999. *Pan-Africanism: Exploring the contradictions. Politics, identity and development in Africa and the African diaspora*. Aldershot: Ashgate.
- AKE C (ed)  
1989. *The political economy of crisis and underdevelopment in Africa*. Lagos: JAD Publishers.
- ALHBERG A  
1992. *Humanismen*. Ludvika: Dualis forlag.
- BIX B  
2005. Legal positivism. In *The Blackwell guide to the philosophy of law and legal theory*. Malden, Massachusetts: Blackwell Publishing Limited.
- COLEMAN J  
1982. Negative and positive positivism. *Journal of Legal Studies* 11(1): 139-164.  
  
1998. Incorporationism, conventionality and the practical difference thesis. *Legal Theory* 4(4):381-426.  
  
2001. *The practice of principle: In defence of a pragmatist approach to legal theory*. Oxford: Oxford University Press.
- D'AMATO A  
1985. The moral dilemma of positivism. *Valparaiso University Law Review* 43(20) Code A85e.
- D'LAMINI AM  
1997. African legal philosophy: A Southern African view. *Journal for Juridical Science* 22(2):69-83.
- ELIAS TO  
1963. *Government and politics in Africa*. Manchester: Manchester University Press.  
  
1958. *The impact of English law on Nigerian customary law*. Lagos: Ministry of Education.
- FATULA O AND ADEYEMO K  
2004. Between sharia, constitutionalism and human rights in Nigeria. *Brainfield Law Journal* 1(2):35-45.
- FINNIS JM  
1980. *Natural law and natural rights*. Oxford: Clarendon Press.
- FOOTE AH  
1854. *Africa and the American flag*. New York.
- GEORGE RP  
1996. *Autonomy of law essays on legal positivism*. Oxford: Clarendon Press.
- GLUCKMAN M  
1967. *Judicial process among the Barotse*. Manchester: Manchester University Press.
- GOLDING MP AND EDMUNDSON WA (ed)  
2005. *The Blackwell guide to the philosophy of law and legal theory*. Malden, Massachusetts: Blackwell Publishing Limited.
- GREENAWALT K  
1996. *Too thin and too rich: Distinguishing features of legal positivism. The anatomy of law: Essays on legal positivism*. Oxford: Clarendon Press.
- HART HLA  
1957. Positivism and the separation of law and morals. *Harvard Law Review* 71(4):593-629.  
  
1994. *The concept of law*. 2<sup>nd</sup> ed. Oxford: Clarendon Press.
- HORTON R  
1998. Positivism and the internal point of view. *Law and Philosophy* 17(5/6): 597-625.
- HOWES D  
2005. Introduction: Culture in the domains of law. *Canadian Journal of Law and Society* 20(1):9-29.
- IDOWU W  
2003. Skepticism, racism and African jurisprudence: Questioning the problematique of relevance. *Quest, an African Journal of Philosophy* 17(1&2):63-89.

2004. African jurisprudence and the politics of social history: An inquiry into the dilemma of canonisation. *Lesotho Law Journal* 14(1):1-27.
2004. African philosophy of law: Transcending the boundaries between myth and reality. *Enter Text, On-line Journal, An Interactive Interdisciplinary e-Journal for Cultural and Historical Studies and Creative Work*. www.entertext.com 4(2):52-93.
2005. Law, morality and the African cultural heritage: The jurisprudential significance of the Ogoni institution. *Nordic Journal of African Studies* 14(2): 49-66.
2006. African jurisprudence and the reconciliation theory of law. *Cambrian Law Review* 37(1):1-16.
2006. Against the skeptical argument and the absence thesis: African jurisprudence and the challenge of positivist historiography. *Journal of Philosophy, Science and Law* 6:34-48.
- IDOWU W AND OKE M**  
2008. Theories of law and morality: Perspectives from contemporary African jurisprudence. *In-Spire Journal of Law, Politics and Societies* 3(2):151-170.
- JORI M**  
1998. Legal positivism. *Routledge Encyclopaedia of Philosophy*. New York: Routledge.
- KASIRER N**  
2002. Bijuralism in Law's Empire and in Law's Cosmos. *Journal of Legal Education* 52(1):29-41.
- KORSGAARD C**  
2002. Oxford Lectures, *Self constitution: Action, identity and integrity, Lecture 1: The metaphysical foundations of normativity*. 1.3.4 (Unpublished).
- LEITER B**  
1998. Realism, hard positivism and conceptual analysis. *Legal Theory* 4: 533-547.
- LETSAS G**  
2000. H. L. A. Hart's conception of law. *UCL Jurisprudence Review*:187-194.
- LEWIS A**  
1965. *Politics in West Africa*. London: George and Unwin.
- LYONS D**  
1977. Principles, positivism, and legal theory. *Yale Law Journal* 87:415-435.
- MACCORMICK N**  
1992. Natural law and the separation of law and morals. *Natural Law Theory Contemporary Essays*. Oxford: Clarendon Press.
- MARMOR A**  
2002. The pure theory of law. *Stanford Encyclopaedia of Philosophy*. <<http://plato.stanford.edu/archives/win2002/entries/lawphil.theory>>
- MASOLO DA**  
2004. Western and African communitarianism: A comparison. *A Companion to African Philosophy*. Malden Massachusetts: Blackwell Publishing Limited.
- MORAUTA J**  
2004. Three separation theses. *Law and Philosophy* 23(2):111-135.
- MORESO JJ**  
2000. In defense of inclusive legal positivism. *Analisi e diritto* (yearbook). Genoa.
- ONIMODE B**  
1988. *A political economy of the African crisis*. London: Zed Books.
- PRIEL D**  
Farewell to the Exclusive-Inclusive Debate. *Oxford Journal of Legal Studies* 25(4):675-696.
- RAMOSE MB**  
1992. African democratic tradition: Oneness, consensus and openness: A reply to Wamba dia Wamba. *Quest* 6(2):61-79.
- RAZ J**  
1984. Hart on moral rights and legal duties. *Oxford Journal of Legal Studies* 4(1):123-131.

Idowu/Positivists' separability thesis reconsidered:  
Perspective from African legal theory

1994. *Ethics in the public domain*. Oxford: Clarendon Press.
1979. *The authority of law*. Oxford: Clarendon Press.
1975. *Practical reasons and norms*. London: Hutchinson.
- RIDDALL JG  
1991. *Jurisprudence*. London: Butterworths.
- SARAT A AND KEARNS T  
1998. *Law in the domains of culture*. Ann Arbor: University of Michigan Press.
- SCALES A  
1986. The emergence of feminist jurisprudence: An essay. *Yale Law Journal* 95(7):1373-1403.
- SENGHOR LS  
1964. *On African socialism*. New York: Frederick A. Praeger
- SHAPIRO S  
1998. On Hart's way out. *Legal Theory* 4(4):469-508.
- SOLOMON RC AND HIGGINS KC  
1996. *A short history of philosophy*. New York: Oxford University Press.
- SOPER P  
1977. Legal theory and the obligation of a judge: The Hart/Dworkin dispute. *Michigan Law Review* 75(3):473-519.
- SPAACK T  
2004. Legal positivism and the objectivity of law. *Analisi e diritto* 2004, a cura di P. Comanducci e R. Guastini.
- STEPAN N  
1982. *The idea of race in science: Great Britain 1800-1960*. London: Macmillan.
- STOCKER M  
1976. The schizophrenia of modern ethical theories. *The Journal of Philosophy* 73(14): 453-465.
- TAIWO O  
1998. Exorcising Hegel's ghost: Africa's challenge to philosophy. *African Studies Quarterly* 1(4). <http://www.clas.ufl.edu/africa/asq/legal.htm>
- TEFFO J  
2004. Democracy, kinship, and consensus: A South African perspective. *A companion to African philosophy*. Malden Massachusetts: Blackwell Publishing Limited.
- TREVOR-ROPER H  
1964. *Rise of Christian Europe*. London: Thames and Hudson.
- WALUCHOW W  
2002. Authority and the practical difference thesis: A defence of inclusive legal positivism. *Legal Theory* 6(1):45-82.
1998. The many faces of positivism. *University of Toronto Law Journal* 48(3): 387-449.
1994. *Inclusive legal positivism*. Oxford: Clarendon Press.
- WIREDU K  
1980. *Philosophy and an African culture*. London: Cambridge University Press.