

## AN OVERVIEW OF THE ONTOLOGICAL BASIS OF AFRICAN JURISPRUDENCE\*

### **Abstract**

*Life for the African is encapsulated in his understanding of the concept of ontology in which 'beings' and 'forces' are hierarchically ordered. A distortion of this order affects the African's 'vital force' and consequent 'vital rank'. This understanding underlies the African conception of law and juridical restitution as regulating communal life and interaction. This paper posits that the whole concept of African jurisprudence is informed by African ontology. And therefore, an understanding of African jurisprudence must be predicated on an understanding of African ontology.*

**Keywords:** *Ontology, Basis, African Jurisprudence, Overview.*

### **1. Introduction**

An understanding of African philosophy of law or jurisprudence must be predicated in an understanding of the African ontology. This is precisely about the study of 'beings' and 'forces' and their ordering as the underlying principle of human existence in society and *a fortiori*, the guiding principle in interpersonal relations with respect to law, right, duty, morality, restitution and legal system, etc. An understanding of jurisprudence is oftentimes subjective, being contingent upon individual societal notions of the foregoing and the proper limits thereof. Such conceptions are influenced and dictated by the idiosyncrasies and basic philosophy of the individual and that of the society to which he belongs. These idiosyncrasies are implicitly embedded in the 'systemic' life patterns and philosophy of society. These implicit realities shape individual and socio-temporal dispositions to the dynamics of existence.

### **2. Jurisprudence in Perspective**

The term 'Jurisprudence' has assumed a complex dimension reflective of the diverse perspectives from which it has been conceived and defined by scholars of diverse persuasions. According to John Austin, the foremost analytical legal positivist who is reputed to have used the term 'jurisprudence' for the first time, it is 'the science concerned with the exposition of the principles, notions and distinctions which are common to systems of law ...'<sup>1</sup>. For Salmond, jurisprudence is synonymous to a type of investigation of an abstract, general and theoretical nature which seeks to reveal the essential principles of law and legal systems<sup>2</sup>. Jurisprudence as an aspect of law that concerns itself with study of general theoretical and fundamental questions about the essence and ends of law, narrowing into the nature of law and legal systems, the relationship of law to justice and morality, as well as the social nature of law. A proper comprehension of the purport of the foregoing questions will involve understanding and use of historical, philosophical and sociological realities and their application to law. Jurisprudence thus inspires a critical questioning of primordial assumptions and engenders a wider understating of the nature and workings of law<sup>3</sup>.

Thus, questions relating to justification often confront the sensibilities of the Judge, or decision maker as the case may be. The realities of the decision maker's historico-socio-philosophical experience influence them enormously in attempting to provide answers to such question as:

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<sup>1</sup> I.B. Carzon, *Jurisprudence*, 1979, 2 cited in F. Adaramola, *Jurisprudence*, 4<sup>th</sup> edn., (Durban: Lexis Nexis Butterworths, 2008), 1.

<sup>2</sup> P. J. Fitzgerald in *Salmond on Jurisprudence*, 12<sup>th</sup> edn., 1966, 1 cited in F. Adaramola, *Ibid*.

<sup>3</sup> D. Lloyd and M.D.A. Freeman, *Lloyd's Introduction to Jurisprudence*, 5<sup>th</sup> edn, (Londond: Stevens & Sons Ltd, 1985), 5.

What constitute good reasons (for decision)?... What happens when the law appears to have gaps? Can the Judge (or decision maker) turn to non-legal sources (to, as it were, fill in the gaps)?... To what sort of standards, other than rules may Judges (or decision maker) appeal?... Is there a right answer and is that answer to be found embedded in the law? What is meant by the law? How far does it extend<sup>4</sup>?

Adaramola conveys from a sociological perspective, the concept of jurisprudence as the amalgam of the art, science, psychology, sociology, biology and epistemology of law. It is the scientific investigation and systematic analysis, synthesis and presentation of certain abstract, general and theoretical ideas about law and legal systems conducted with a view to discovering the ultimate truths and principles if any, which underlie human societies aimed at leading to replacement or reformation and consequent improvement of their functioning<sup>5</sup>. Jurisprudence attempts to offer incisive clues that enhance a greater appreciation of the basics of argument and reason.

It is a fact that law in practically all societies has not been static. It has been dynamic, reflecting thereby the ideologies, idiosyncrasies or peculiarities of society within a spacio-temporal context Nigeria and indeed, African traditional societies have had ample a experience of societal evolution from primitive times to attempt at regulating the society through the instrumentality of customary norms snow-balling into laws.

### 3. The Concept of Ontology and African Legal Thought

Ontology is the philosophical understanding of the nature of beings, existence or reality as well as the basic classifications of beings and their interaction. Ontology often deals with questions about the existence of entities or beings and their categorization and relationship within a hierarchy including their sub-divisions depicting their similarities or otherwise. Ontology thus, concerns itself with fundamental questions about existence of things and their categories, the meaning of being and their various modes as well as their interactive relations and reactions attendant thereto. The word 'Ontology' is derived from the Greek words *onto* (being) and *logis* (study)<sup>6</sup>.

The philosophy of a people provides an underlying basis for their native jurisprudence. The philosophy of the peoples of Africa conceives that the whole essence of life is based on its ontology. 'Ontology' is the study of 'being' which to the African is synonymous with 'force'. Thus, the life of the African finds expression in the firm belief of 'beings' and 'forces' and interaction thereof. African ontology envisages a hierarchical ordering of beings and forces in their categories in order of primogeniture with God at the apex.

The whole essence of life for the African is based on its ontology<sup>7</sup>. 'Ontology' is the study of 'being' which to the African is 'force'. Accordingly, the African<sup>8</sup> speak, act and live as if beings were forces. Force, in their conception, is not an accidental reality. It is more than a necessary attribute of being. It is the nature of being. Force, is being and being is force. African ontology therefore, envisages a hierarchal ordering of forces reflecting their primogeniture with God at the apex; then man (living and

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<sup>4</sup> *Ibid*, 7.

<sup>5</sup> F. Adaramola, (n. 1), 2.

<sup>6</sup> *whatis.techtarget.com* accessed on 10/08/2017, 1.

<sup>7</sup> The Beatu people of Eastern and Central Africa as well as the Igbo people of Eastern Nigeria as paradigms

<sup>8</sup> Plecide Tempels, *Bantu Philosophy*, (Paris: Presence Africaine, 1969), 49.

departed); animals; plants; and minerals<sup>9</sup>. Thus, the origin, subsistence, or annihilation of beings or of forces, is expressly or exclusively attributable to God and accordingly, one force that is greater than another can paralyse it, diminish it, or even cause its operation totally to cease, but for all that, the force does not cease to exist. Existence which comes from God cannot be taken from a creature by any created force<sup>10</sup>.

The African concept of ontology finds expression in its system of dispensation of justice and gives meaning to its notions of customs and norms as a means of regulating law *in se*. To the African therefore, the notion of evil constitutes injustice towards God and towards the natural order which is the expression of His will. Similarly, evil and injustice towards ancestors and others in the ontological hierarchy consists in making an attempt against their vital rank and *ipso facto*, their vital force. The life of the African is not limited to his own person, but necessarily extends to all that is fathered by his vital influence and *a fortiori* all that is ontologically subject to him – posterity, land possessions, beasts and all other goods. Just as every good office- every help and assistance count before all else as a support, an increase of life to him who is the beneficiary, so every attempt, however insignificant, against the person of one who depends upon him, or simply upon his material possession, will be considered as an injury to the integrity of his being, the intensity of his life, his vital rank and by implication, his vital force. Thus:

Every injustice ... is a stupendous evil measured in terms of the worth of life and infinitely exceeding in every case all calculation in economic terms of the loss suffered, but the measure of the outrage on life endured, which will serve as the basis of assessment of compensation or damages<sup>11</sup>.

It follows from the foregoing that to the African, the quantum of damage in compensation for a disturbance or distortion of his vital force cannot be located within the context of the 'Western' ideas of apportionment or award of damages nor is the measure of compensation dictated by *lex talionis*<sup>12</sup>. It is the victim that dictates what quantum of compensation will assuage his disturbed vital force and restore or re-establish same to *status quo ante*.

The exact restitution of an object stolen, or the drawing up of a tariff of damages, are located squarely in the African conception of life as central in man. For it is not appropriate in the African understating, to measure good and evil done to man by criteria which are external to him. To do so will overlook the essential point – the re-establishment of the ontological order and of the vital forces that have been disturbed or distorted. Even when the restitution takes the form of a transfer of natural good, it is considered as part of the re-establishment of life. In the words of Fr. Tempels:

...primitive law is essentially a law of persons rather than a code concerning goods. It is law about the vital force and life, it is not a law of good, property and their transference. It is only through the philosophy of vital forces that we can understand how reasonable ... that conception of customary law is...<sup>13</sup>.

Concrete instances abound to buttress the reasoning of the African. A man lends another a certain amount of money to solve a pressing need to escape ridicule or distraint. The borrower agrees that he has been 'saved' or 'delivered' by the lender and for which the borrower is ready to pay reimbursement

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<sup>9</sup> *Ibid*, 51 – 52.

<sup>10</sup> *Ibid*, 61.

<sup>11</sup> *Ibid*, 142 and 143, italics supplied.

<sup>12</sup> *Lex Talionis* literally means 'an eye for an eye'.

<sup>13</sup> Plecide Tempels, (n. 8), 145.

worth ten times in excess of the original sum lent. Similarly, a man in whose control a dog is, which is seen devouring the remains of a cock and probably without evidence of being the cause of death of the cock, is nonetheless ready to pay an indemnity of three live cocks plus a considerable sum of money. This is because everything which happened to the cock must be attributed to its owner's conscious or unconscious influence. This might appear usury, swindling and crass exploitation of human misery unless a deeper appreciation of patterns of primordial native life is understood. Thus, besides and beyond economic damages, the sorrow, the wrong done to man, constitute the right to reparation. Accordingly, in the conception of the African, the man wounded during his peaceful enjoyment of life, in the fullness of his vital force, the wholeness of his life, has a right to restoration of being. Material indemnities have no other significance than that of achieving the restoration of the man<sup>14</sup>.

#### 4. The Role of the Judge or Decision Maker in Juridical Restitution

What then to the African is the function of the Judges or decision makers? Their role is firmly anchored in an understanding of the people's ontology. Thus:

It seems that according to... custom, the Judges (or decision makers) confined themselves to stating who was right and who was wrong, who was 'white' and who 'black' who was 'strong' (in his own right) and who was 'feeble' (and was succumbing)... In declaring who is white and who black, the Judges (or decision makers) have proclaimed the law. He who is acclaimed 'white' and 'strong' has the right to exact reparation for his life and the payment of economic indemnities, compensations, etc., follows then as a matter of course... It is the injured man who in theory has the right to say what he considers necessary for the restoring of the fullness of his vital force. Very often, the Judges (or division makers) confirm and sustain the exigencies of the 'string' man<sup>15</sup>.

It follows that for the African, 'juridical restitution' appears coterminous with 'restoration' of vital force. These ideas of restitution and justice find general manifestation in primordial African societies including the Igbo speaking areas of Nigeria. It will be recalled for instance, that in his celebrated novel, *Things Fall Apart*, Professor Chinua Achebe aptly captures and conveys this Igbo ideas of restitution and justice which tally with the Bantu conception. Thus, when Ogbuefi Ezugo disclosed to the Umuofia village assembly the sad news of the murder of the wife of Ogbuefi Udo at Mbaino village where she had gone to the market to make purchases, the people of Umuofia erupted in marked revulsion and disapproval of the dastardly act. In consequence, the people of Umuofia demanded as restitution for the murder, a young man and a virgin girl from Mbaino village to assuage their anger and as it were, 'restore their vital force' or else there will be war. As a fall out of the village assembly of Umuofia:

... an ultimatum was immediately dispatched to Mbaino asking them to choose between war on the one hand and on the other, the offer of a young man and a virgin as compensation. Umuofia was feared by all its neighbours. It was powerful in war and in magic, and its priests and medicine men were feared in all the surrounding country. Its most potent war medicine was old as the clan itself... And so the neighbouring clans who naturally knew of these things feared Umuofia and would not go to war against it without first trying a peaceful settlement. And in fairness to Umuofia, ... it never went to war unless its case was clear and just and was accepted as such by its oracle... But the war they now threatened was a just war. Even the enemy clan knew that. And so when Okonkwo of Umuofia arrived at Mbaino as the proud and imperious

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<sup>14</sup> *Ibid*, 146 and 147.

<sup>15</sup> *Ibid*.

emissary of war, he was treated with great honour and respect, and two days later he returned home with a lad of fifteen and a young virgin. The elders or ndi Ichie, met to hear a report of Okonkwo's mission. At the end they decided as everybody knew they would that the girl should go to Ogbuefi Udo to replace his murdered wife. As for the boy, he belonged to the clan as a whole<sup>16</sup>.

This is a clear case of the 'strong' or rather the 'victim' dictating the terms of settlement and due compensation.

### 5. The African and the Received Western Conception of Justice

Africans, prior to the advent of colonialism had established customs and norms that governed the administration of justice and resolution of disputes between its people. These customs and norms formed part of customary law. This state of affairs appears to offend the sensibilities of the non-African, the colonial master. And so, the natural organic development of indigenous law and legal system was seemingly interrupted by the introduction of foreign value test, based on the received colonial standard. Henceforth, any African custom which was found contrary to, or inconsistent with the English common law and doctrines of equity (customs) was declared repugnant to natural justice, equity and good conscience<sup>17</sup>. In some cases, these standards were accommodated by the native environment, in some others, the standards were antithetical to native environment and reasoning. A few instances in this regard will suffice.

In *Eshugbayi Eleko v Officer Administering The Government of Nigeria*<sup>18</sup>, Lord Justice Atkin sitting in the Judicial Committee of the Privy Council took the view that 'if it (customary law) stands in its barbarous character, it must be rejected as repugnant to natural justice, equity and good conscience... the court cannot transform a barbarous custom into a milder one'. And in *Laoye v Oyetunde*<sup>19</sup>, Lord Wright, also sitting in the Privy Council expressed a similar view.

The pertinent questions that should underlie a jurisprudential understanding of acceptable standards of a custom are to a great extent dependent on who determines such standards as 'barbarous', 'uncivilized' or otherwise, and what the effects of such determination are. Their Lordships in the foregoing cases appear to share the view that a custom is repugnant to natural justice, equity and good conscience if it is barbarous, uncivilized. Professor Obilade suggests that it does not however seem that the test ought to be the standard of conduct acceptable in advanced and developed societies such as England<sup>20</sup>. Similarly, Professor Ezejiofor opines that a rule of customary law will not be declared void merely because it is inconsistent with the principles of English law<sup>21</sup>.

Thus, in *Dawodu v Danmole*<sup>22</sup> the Privy Council rejected the views of the learned trial Judge, Jibowu J. that the 'idi-igi' Yoruba custom on succession was repugnant to natural justice, equity and good conscience. Justice Jibowu had expressed the view that the custom by stating that the deceased's property

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<sup>16</sup> Chinua Achebe, *Things fall Apart*, (London, Ibadan, Nairobi: Heinemann Educational Books, 1958), 8 -9.

<sup>17</sup> U.S. F. Nnabue, 'Promoting Conflict Resolution, Through Non-Adjudicatory Process', *Abia State University Law Journal*, 1997, Vol. 1, 58.

<sup>18</sup> [1931] AC 662 at 167.

<sup>19</sup> [1934] AC 170.

<sup>20</sup> A. O. Obilade, *The Nigerian Legal System*, (London: Sweet & Maxwell, 1979),.101.

<sup>21</sup> G. Ezejiofor, 'Sources of Nigerian Law' in C. O. Okonkwo (ed), *Introduction to Nigerian Law*, (London: Sweet & Maxwell, 1980), 43.

<sup>22</sup> [1962] 1 WLR 1053.

was to be shared among his children *per stripes* rather than *per capita* was inconsistent with the modern idea of equality among the children. The Board emphasized that ‘the principles of natural justice, equity and good conscience applicable in a country where polygamy is generally accepted should not be readily equated with those applicable in a community governed by the rule of monogamy’<sup>23</sup>.

The standards could be of value if a given custom in issue falls far below a universally acceptable benchmark based on a civilized objective moral conduct. And so in *Edet v Essien*<sup>24</sup>, the appellant paid dowry in respect of a woman when she was an infant. Later, the respondent paid dowry in respect of the same woman to her parents and took her as his wife. The appellant claimed custody of the children of the marriage insisting that he was the rightful husband of the woman under native law; and that the woman was barred from contracting ‘another legal marriage’ until the dowry paid by him was refunded to him; and that he was entitled to any child born by the woman until the said refund was done. It was held that the alleged rule of customary law has not been established and even if it had been established, it was repugnant to natural justice, equity and good conscience<sup>25</sup>.

In more recent times however, Justice Uwaifo in *Augustine Nwafor Mojekwu v Theresa Iwuchukwu*<sup>26</sup> warned that in applying the repugnancy doctrine to native custom:

It must be remembered that a custom cannot be said to be repugnant to natural justice, equity and good conscience just because it is inconsistent with English law concept or some principles of individual right as understood in any other legal system... So the court must hear the parties and act with solemn deliberation over all the circumstances before declaring or pronouncing a custom repugnant. Admittedly, there may be a difficulty in reaching a decision in some obviously outrageous or needlessly discriminatory customs. In some other cases, it may not be so easy. That is where the repugnancy principle should be dispassionately considered and applied.

## 6. African Customary Law and Organic Humanism

Native law and custom of the African has survived the test of time amidst the standards to which it had to be subjected, essentially due to its characteristics as an organic or living law among the people. According to the historical theory of law, there are some basic rules which underlie law properly so called. These include:

- (a) that law is a matter of unconscious growth. Any law making should therefore follow the course of historical development.
- (b) Custom not only precedes legislation, but it is superior to it and legislation should always conform to the popular consciousness.
- (c) Law is not of universal application, it varies with people and ages.
- (d) the ‘people’s spirit’, their customs and practices, ‘*the volkgeist*’ cannot be criticized for being what it is. it is the standard by which laws, which are the conscious product of the will as distinct from popular conviction, are to be judged<sup>27</sup>.

For Von Savigny, one of the leading proponents of the historical school of jurisprudence, ‘a legal system was part of the culture of the people... a response to the impersonal powers to be found in the people’s

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<sup>23</sup> *Ibid*, 1060.

<sup>24</sup> [1932] II NLR 47.

<sup>25</sup> The Court had earlier in *Re Effion Okon Ata* [1930] 10 NLR 65 come to the conclusion that a native custom whereby a former slave master was entitled to administer the late slave’s estate, was repugnant to natural justice, equity and good conscience.

<sup>26</sup> [2004] 18 NSCQR 184, 201.

<sup>27</sup> U. S. F. Nnabue, (n. 17), 60.

national spirit... Thus, *Volkgeist*—a unique, ultimate and often mystical reality—was linked to the biological heritage of a people<sup>28</sup>. Law as conceived from a historical perspective as being a reflection of a people's spirit which can only be understood within the context of the people's history. Law is part of an organic state which is born, matures, declines and dies. As Von Savigny succinctly puts it, 'law grows with the growth, and strengthens with the strength of the people, and finally dies away as the nation loses its nationality'<sup>29</sup>. Law must therefore be seen as 'historically organic', mirroring thereby the dynamic stages of societal development.

Bairaman F. J. in *Owonyin v Omotosho*<sup>30</sup> described customary law as 'a mirror of accepted usage'. Thus, customary law must have the assent of the native community and reflect its humanism. This gives a custom its validity. It must therefore be shown that the custom is recognized by the native community as regulating its affairs<sup>31</sup>. Societies are dynamic and African societies are no exception to that dynamism, reflecting thereby some degree of flexibility in line with changing circumstances. Osborne C.J. underscores this point in *Lewis v Bankole*<sup>32</sup> as follows: 'one of the most striking features of West African native custom... is its flexibility. It appears to have been always subject to motives of expediency, and it shows unquestionable adaptability to altered circumstances without entirely losing its character'.

Obaseki JSC reiterates the organic nature of native customary law in the recent case of *Oyewunmi v Ogunesan*<sup>33</sup>. According to his lordship:

Customary law is the organic or living law of the indigenous people of Nigeria, regulating their lives and transactions. It is organic, in that it is not static. It is regulatory, in that it controls the lives and transactions of the community subject to it. It is said that custom is a mirror of the culture of the people. I would say that customary law goes further and imports justice to the lives of all those subject to it.

Customary law as a living law remains a vital part of Nigerian law and jurisprudence. It reflects the totality of the essence of life and being of the African and regulates interaction *inter se*. This is the whole essence of the African ontology as the basis of African jurisprudence.

## 7. Conclusion

In pre-colonial African societies, people lived in close knit communities reflecting the cherished virtue of African humanism. Disputes that arose among members of the community were settled in the basic spirit of give and take, or compromise. The African conception of law is solidly grounded in the African ontology and the belief that the predominant function of law is the maintenance of peace, order and equity so as to avoid distortion of the 'vital forces' in their hierarchy. From this deep rooted conception of African jurisprudence emerges the overriding duty of a 'court' as an instrument for the resolution of disputes based on the restoration of distorted 'vital rank' and the reconciliation of the disputing parties. This is the pursuit of 'real' as opposed to 'abstract' justice. In so doing, due circumspect ought therefore, to be attached to the study and comprehension of the customs of the people in accordance with the peoples own norms of conduct acceptable to them. One would therefore, not appreciate the rational grounds and spirit of the African custom which underlie the principles and the logic of the African juridical system without a proper understanding of their ontological philosophy and the natural law viewed from their prism.

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<sup>28</sup> D. Lloyd and M.D.A. Freeman, (n. 3), 868.

<sup>29</sup> *Ibid*, 868 – 869.

<sup>30</sup> [1961] 1 All NLR, 304, 309.

<sup>31</sup> Lord Atkin in the *Eleko case (supra)*, (n. 18), 673.

<sup>32</sup> [1908] 1 NLR 81, 100 -101.

<sup>33</sup> [1990] 3 NWLR (Pt. 137) 182, 207.