

Against the *Skeptical* Argument and the *Absence* Thesis: African Jurisprudence and the Challenge of Positivist Historiography

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INTRODUCTION

The general name for the body of thoughts on law – its nature, scope, functions, and limitations - is called jurisprudence. In its philosophical essence, jurisprudence is concerned with the theory or the science of law. Etymologically, the word jurisprudence derives from the Latin term ‘*juris prudentia*’, which means “the study, knowledge, or science of law.” It is in portraying this philosophical ideal that Wolfgang Friedmann (1969:448-9) opines that “all legal theory must contain elements of philosophy, which is an attempt to systematize man’s reflections on his relation to the universe.” In another light, Friedmann (1969:449) contended that the task of legal theory is the “clarification of legal values and postulates up to their ultimate philosophical foundations.” Thus, beneath most jurisprudential conclusions, views and opinions in western literature is the identification of a philosophical ideal.

Historically, there have been and there still are different orientations and worldviews in the attempt to understand the nature of law and its function in every relevant society. This is premised on the fact that men have not always held the same view about law and its overall place in societies. Men’s perceptions about the law, and the different orientations that have grown out of these perceptions cannot be extricated from their overall philosophy and experiences.

An aspect of jurisprudence that has not been adequately pictured in philosophical reflections on the nature of law and jurisprudence in general is the idea of African jurisprudence. There are and have been many reasons for this absence. In fact, the quest for the nature of African jurisprudence is not one that can be glossed as if it is not controversial. The indication that is conspicuously thrown up in much current jurisprudential literature is a loud absence of African articulation on the subject matter of jurisprudence. This is perhaps, a fallout from the long tradition of denying the existence and possibility of African philosophy, or African philosophical traditions.

Fortunately, that scepticism about African philosophy has been definitely transcended. Although the general denial of African philosophy has died a

natural death, the implicit denial of African jurisprudence seems to persist. For instance, the classical and contemporary texts appear to regiment this controversial denial. A study of such texts reveals an obvious and conspicuous lacuna and pertinent discovery that presents itself to us is the fact that conspicuously missing in this panoramic canonisation of jurisprudential works is the canonisation of African intellectual resonance and mental disquisition on the idea of law.

This raises two important but separate questions with respect to the African jurisprudence dilemma. The first concerns what the nature of African jurisprudence is. The second relates to what accounts for the dilemma of the canonisation of African jurisprudence in mainstream jurisprudential literature. Several positions and opinions seem to be in the air as intellectual responses to these central questions of African jurisprudence and its quest for relevance in an age reeling under the influence of globalisation.

In our view, four glaring positions are discernible in the responses to the question whether there exists an African jurisprudence. Evidently, these varying positions have their corresponding justifications. These four positions can be conveniently classified, in their order, as the *sceptical* argument ((Driberg, 1934; Holleman, 1974; M'Baye, 1975); the *ignorance* argument (Smith, 1965; Hartland, 1924); the *difference/non-difference* argument (Okafor, 1985; Taiwo, 1985; Oladosu, 2002), and the *existence/reality* argument (Gluckman, 1967, 1964; Allot, 1960; Elias, 1956, 1963).

This summarises the content of academic responses and debates on the African jurisprudence project. What is of curious interests is that some of these views especially the reality/existence arguments only project and portray African traditional systems as having system of rules and governance but did not in actual fact argue whether Africans had or have a theory of law. It is this lacuna on the possibility of the nature of African jurisprudence that the present effort hopes to fill. In the latter part of the essay, an attempt shall be made to construct what the inherent philosophical ideal is inherent in African law and system of governance. This will serve as a point of departure from existing academic responses on the nature of African jurisprudence.

In the same vein, attempts to answer the second question on the under-representation of African jurisprudence in jurisprudential literature can be generally classified into three: the ignorance thesis (Allot, 1960), the absence thesis (Elias, 1956) and the cultural prejudice thesis (Idowu, 2004). There are, perhaps, no or little efforts to provide answers on the plausibility of the sceptical and absence thesis by building on the argument whether the absence of written records is a weighty intellectual argument to deny a jurisprudential character to the status of African rules and laws. We shall attempt to provide answers on the plausibility of the sceptical and absence thesis by building on the argument

whether the absence of written records is a weighty intellectual argument to deny a jurisprudential character to the status of African rules and laws.

On the whole, therefore, what we are set out to do in this paper, in the light of these two central questions, is to examine only the sceptical argument and the absence thesis. In doing this, what is at stake for us is to examine and weigh the plausibility of both arguments in the light of African jurisprudence's quest for relevance.

The sceptical argument simply states that there is nothing called African jurisprudence. Interestingly, the basis for the sceptical argument seems to have received a kind of intellectual support from the absence thesis. The absence thesis is the idea that African jurisprudence does not exist in as much as there is the absence of written records or work of intellectual worth. At the level of perception, both the sceptical argument and the absence thesis seem to be intertwined and thus connected in the denial of the existence of African jurisprudence.

In examining the plausibility of these arguments against African jurisprudence, our contention is that both arguments are essentially flawed in the sense that they do not really prove beyond all doubts the non-existence of an African jurisprudence. The arguments are really presumptive in their various claims rather than factual. To make a factual claim about the denial of African jurisprudence is to exhaust all available evidences, a fact which is evidently missing in both the sceptical argument and the absence thesis.

THE SKEPTICAL ARGUMENT

What is the nature of the sceptical argument? What is the contention of the absence thesis? What is the connection between the sceptical argument and the absence thesis? What is the plausibility of both positions in relation to the reality of African jurisprudence? The sceptical argument simply states that there is nothing called African jurisprudence. Proponents of the sceptical argument are varied and the basis for this sceptical claims and conclusions appears diverse.

A very crude and unrefined example of the sceptical argument against African jurisprudence is the view of J. G. Driberg. In Africa, "generally speaking," according to Driberg, "symbols of legal authority [i.e. police and prisons] ...are completely absent, and in the circumstances would be otiose" (1934:237-238). One other clear example of a proponent of the sceptical argument is that of J. F. Holleman (1974:12) who wrote in a very provocative work that there is nothing like an African jurisprudence. M'Baye (1975) constate that "the rules governing social behaviour in traditional African societies are the very negation of law." In the same vein, M. G. Smith (1965) postulated that "African peoples only know of customs instead of law."

The sceptical frame in the views of these authors consists in the fact that Africans lack a conceptual and vividly correct analysis of the concept of law. Significantly, the import of this argument has been pushed further in the view that even if Africans had indigenous systems of social control, it lacked substantially, any trace of legality, legal concepts and legal elements. The unwarranted conclusion often drawn from these sceptical positions is the view that the jurisprudential frame is missing and lacking in African system of rules.

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

On our part, we argue that the attempts to down play the reality of African systems in general and African jurisprudence in particular has a peculiar history. But then it is sufficient to state, as a conceptual and intellectual response, that regardless of how primitive a society may be seen to be, it is human and logical to expect that the survival of this kind of society is an ample pointer to the existence of some form of enlightened thinking on the part of its members. The sceptical argument is often furthered and eloquently corroborated by an equally powerful and mesmerising thesis which we have called the absence thesis.

THE ABSENCE THESIS

The absence thesis is the idea that African jurisprudence does not exist in as much as there is the absence of written records. The absence thesis is much implicit not just as an excuse in the denial of the idea of an African jurisprudence but equally in the denial of what is regarded as African philosophy. This is perhaps, a fallout from the long tradition of denying the existence and possibility of African philosophy, or African philosophical traditions. Fortunately, that scepticism about African philosophy has been definitely transcended. At the level of perception, this is an indication of the fact that African jurisprudence is a counterpart of the African philosophy project. As observed by Samuel Imbo (1998:xi), "much of contemporary writing on African philosophy is a challenge to the bases and content of western scholarship... Indeed, the theme of whether philosophy can exist and thrive in the absence of written texts runs through many contemporary discussions in African philosophy." In the same vein, Kwasi Wiredu exclaims that

*The African philosopher writing today has no tradition of written philosophy in his continent to draw on. In this respect, his plight is very much unlike that of, say, the contemporary Indian philosopher. The latter can advert his mind to any insights that might be contained in a long-standing Indian heritage of written philosophical meditations; he has what he might legitimately call classical Indian philosophers to investigate and profit by."*¹

But does this vitiate the philosophical import in such African tradition, even if oral? The opinion of Robert C. Solomon and Kathleen M. Higgins is very instructive. In their estimation,

...it is highly probable that much of Africa has been inhabited by tribes with complex and sophisticated ways of thinking about the world. Indeed, listening to human beings talk and speculate from one end of the earth to the other, in rural villages as well as urban cafes, it is hard to believe that any people did not or do not "do" philosophy, in some form or another. They wonder, what are the stars? Why do things happen? What is the significance of our life? Why do we die, and what happens to us when we do? What is really good, and what is evil? There is no reason to suppose that such questions and the thoughts that follow them were limited to those cultures that eventually employed written language and thus preserved texts for future generations to read and study (1996: 6).

The veracity of this assertion opens us to a world of limitless possibilities with respect to the philosophical nature of African thought in general. It also establishes the basis for characterising a system of thought as either philosophical or not. For instance, it ascribes a philosophical dimension to any thought system that is inquisitive in nature. The import is that philosophy essentially deals with the art of wondering. Wonder starts and lubricates the philosophical enterprise. Such inquisitive thought systems are demonstrated by the human mind engaging itself in the search for answers to some fundamental questions and issues of life such as death, the good life, the meaning of life etc. In one word, what is of interests is that a system of philosophy does not lie in the mere fact that such system of thought was written down. It is our presumption that, according to Solomon and Kathreen, philosophy consists not only in its existence in written form but also in substance.

As much as this observation by Solomon and Kathreen appears instructive, it is dampened by the fact that it was more or less a speculative proposition or proposal. It only ascribes a possibility to the existence of African systems of thought that could be described as philosophical. In any case, the merit of the

proposal consists in the fact that it explores as real what had hitherto been classified as a myth.

In the light of this, the merit or truth in Wiredu's analysis needs to be qualified. While the first half of his assertion and observation may be true even though it neither precludes the presence of a philosophical spirit nor a distinct history, the other half of his comment on Indian philosophy may not be entirely true. A proper qualifier is needed. According to Will Durant, the origin of Indian philosophy is veiled and every attempt to pass a conclusive statement is at best hypothetical. What is sure about the beginning of Indian philosophy, according to Will Durant, is the very thing Wiredu affirms of African philosophy: the absence of written texts.

Perhaps, we can add that only in the modern age is the attempt made to harness together into writing the substance of Indian philosophy. "It was the usual course for a philosophical teacher in India," writes Durant, "to speak rather than to write; instead of attacking his opponents through the safe medium of print, he was expected to meet them in living debate, and to visit other schools in order to submit himself to controversy and questioning" (1954:533). To this end, "Indian thought was transmitted rather by oral tradition than by writing," and the substance of this tradition was contained in what is called "*sutras* – aphoristic "threads" which teacher or student jotted down, not as a means of explaining his thoughts to another but as an aid to his own memory" (1954:534).

All philosophy in the world tends to be limited by this fact. We were not told that Thales wrote anything. All he postulated were penned down, perhaps, by a generation quite remote from his time. The perennial orthodoxy of oral tradition as the commencing point of the transmission of all philosophy is not peculiar to the African milieu. And just as the absence of written texts is crippling for African philosophy, it has been for other systems and this was not, however, enough to limit the philosophical substance in the transmitted thoughts. The philosophical beauty of their thoughts is still appreciated in modern times. In very captivating terms, Solomon and Kathreen Higgins noted that

Only our ignorance and prejudice prevent us from entertaining the possibility that rich schools of philosophy and sophisticated argumentations once flourished throughout the world. Many societies had intricate oral cultures which used more-intimate and often more-effective methods than writing to hand knowledge from one generation to another. Face-to-face storytelling is captivating and personal. Literacy was rare. The written word was hard to come by and "cool", distant, and impersonal by comparison. Elders in oral societies passed along their wisdom in poetry and song.

When those cultures disappeared, however, their ideas – and whole civilizations, in effect – were lost to us (1996:6).

And what is more, due to the absence of writing on their part, later generations of scholars who were able to gather the thoughts of the past generations by some means, did not really capture the substance of their thoughts, considering the possibility of later impositions on what their philosophical interests were. Thus, the problem of written ness is a defect common to almost all philosophy whether in the west, or the Far East (Durant, 1954: 556-561). The debate over the primacy or the superiority of Occidentalism and Orientalism in the entire history of thought is a classical demonstration of the Eurocentric nature of social history in general and intellectual history in particular. This is captured in Durant's observation that:

Historians of philosophy have been wont to begin their story with the Greeks. The Hindus, who believe that they invented philosophy, and the Chinese, who believe that they perfected it, smile at our provincialism. It may be that we are all mistaken; for among the most ancient fragments left to us by the Egyptians are writings that belong, however loosely and untechnically, under the rubric of moral philosophy. The wisdom of the Egyptians was a proverb with the Greeks, who felt themselves children beside this ancient race (1954:193).

The fate that inundated the cream of Hindu philosophy after the Mohammedan and Christian invasions which drove the heart of Hindu philosophy into self-defence and a timid unity that made treason of all debate and stifled creative heresy in a stagnant uniformity of thought could have, probably, affected African thoughts in the face of the many harassment from the era of slavery, to colonialism and the invasion of Islam and Christian missionary efforts even though this is a cautious remark obviously in need of historical verification.

As a matter of fact, the philosophical priority of Africa is clearer in jurisprudential philosophy than in any other area of intellectual endeavour. This is because law reflected the imperatives of changing economic, political, and social circumstances. The presence of this jurisprudence is a telling argument on the existence of philosophy in Africa. Inherent in every system of jurisprudence, at least, is a philosophy that underlies it. The articulation of such a jurisprudential outlook, no matter how rudimentary, presupposes the existence of a philosophical worldview.

This contention is in agreement with the observation of Will Durant that no society that exists and continues to survive till today could have done so without order and one form of regulation or the other. In his words, "since no society can

exist without order, and no order without regulation, we may take it as a rule of history that the power of custom varies inversely as the multiplicities of laws, much as the power of instinct varies inversely as the multiplicities of thoughts” (1954: 36).

The ultimate, dousing question is must a body of thoughts about law (or any other field of human endeavour) be written before ascribing a jurisprudential nature to it? Truly, if you are not able to theorise, you will have nothing to write down. One may be able to theorise, and may in fact theorise, without recording the theories. The absence of the former precludes the latter, but not vice-versa.

THE BASIC PHILOSOPHY OF AFRICAN LAW

It is imperative in a discussion on the nature of an African jurisprudence that leading thoughts and hints on what Africans often take the idea of law to be must form the foundation of the analysis. A piece on African philosophy of law, strictly so-called, could not omit a consideration of the nature of African jurisprudence, no matter how perfunctory, and still seriously contest for academic legitimacy. Looking across the broad panorama of philosophical and legal traditions amongst African scholars in recent times, there have been series of responses in relation to the philosophical ideal of African law.

An interesting piece in recent times is that of John Murungi. Murungi's work, however, is more of an interrogation rather than a conceptual and substantive analysis; a reflection on the question of existence rather than an articulation of the substantive thesis of the nature of African jurisprudence. At best, the 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 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...(2004: 525)

From Murungi's assertion above, certain gems of truth with respect to the nature of general jurisprudence and African jurisprudence can be deciphered. One clear understanding is that jurisprudence is basically a human-centred enterprise. Jurisprudence is about humans and thus, law is about humans. This assumption underlies the contribution of jurisprudence in all cultures. This is corroborated in the light of Chinese philosophy, for instance. According to the realism of *Hsun-*

tze, a Chinese philosopher, the necessity of law was informed by the nature of man. For him,

the nature of man is evil; the good which it shows is factitious...the sage kings of antiquity, understanding that the nature of man was thus evil...set up the principles of righteousness and propriety, and framed laws and regulations to straighten and ornament the feelings of that nature and correct them,...so that they might all go forth in the way of moral government and in agreement with reason.²

But then, to what extent is Murungi's statement true that each path of jurisprudence represents an attempt by human beings to tell a story about being human? What is meant by being human in relation to jurisprudence? Is law necessarily human in nature and origin? What about laws such as international laws purporting to be connected with countries and states in the international scene? Since they also have a jurisprudential element, can they be regarded as human-centred? Isn't there a problem with this conception of jurisprudence? And what is more, what do we say of scientific laws?

From a critical perspective, if we understand Murungi very well, one is bound to conclude that, in actual fact, jurisprudence is a human-centred discipline. Even in the area of international law, the law in question is applicable to states indeed but what it means is that it applies to states as constituted by human beings. Areas of law such as maritime law, law of the sea, law of the environment, animal rights law and such other abstractions in the conception of law are meant to apply to man in the actual sense. From this reading, even where we talk about natural law in terms of the law applicable to all aspects of the universe, it is still to be submitted that law has meaning only in recognition to man and his interaction and encounter with the universe.

Where it is the case that natural laws guide the whole of nature, it is to be expected that the basic reason is to regulate the actions of man in his endeavour to explore and interpret the whole of the universe and encounter himself. More importantly, however, if this is what is meant, we can deduce that Murungi's conception tends to be positivistic in nature. But, is this a correct perceptual reading and understanding of Murungi's position?

The extent of his positivism, however, is not that settled. As a matter of fact, Murungi's conception of jurisprudence is not in consonance with modern, contemporary positivism even though it is described as a science of law from a human-centred perspective. Austinian jurisprudence, an obsession with human laws, deflects from the assumption of Murungi that jurisprudence is a human centred discipline. Crucial though to both conceptions of jurisprudence is the conception of humanity at stake, but then it is no misnomer to contend that there are divergent opinions on this issue.

The nature of Murungi's positivism is complicated and blurred. One of the revered elements of Murungi's African jurisprudence consists in his emphasis on the sacredness of tradition and customs when juxtaposed with the nature of modern European law. While Austin relegated the juristic and jurisprudential significance of custom in his analysis of the nature of law, Murungi's adoration and celebration of customs as possessing one of the keys to a cerebral understanding of the substance of African law is worthy of intellectual attention. On this issue, Murungi's statement tends to draw a world of corroboration and strength from the observation of Will Durant on the veracity of customs. In his words,

Underneath all the phenomena of society is the great terra firma of custom, that bedrock of time-hallowed modes of thought and action which provides a society with some measure of steadiness and order through all absences, changes and interruptions of law...when to this natural basis of custom a supernatural sanction is added by religion, and the ways of one's ancestors are also the will of the gods, then custom becomes stronger than law, and subtracts substantially from primitive freedom. To violate law is to win the admiration of half the populace, who secretly envy anyone who can outwit this ancient enemy; to violate custom is to incur almost universal hostility. For custom rises out of the people, whereas law is forced upon them from above...(1954: 26).

For Murungi, what complicates the encounter between European law and African law is the abstruse relegation of the normative understanding of what it means to be human in an African way and how crucial that denial is to ideological basis of European jurisprudence. For Murungi,

“what is elemental in every jurisprudence is the conception of being human that is presupposed. It is precisely for this reason that it is herein claimed that African jurisprudence is what is at stake in being human for Africans. If jurisprudence is to be understood as a science, it is to be understood, in its African context, as a science of being human as understood by Africans (2004:523).

What is also conceivable in Murungi's conception of jurisprudence is the fact that what connects jurisprudence in all cultures is its connection to an understanding of the internal aspects of humanity. This implies that as a human-centred discipline, the common element that features in all jurisprudence is what those jurisprudences have to say about man. Thus, at one level it can be said that jurisprudence is a unified subject since man is man every where and in all cultures.

But then, at another level, jurisprudence, even though it shares a common nature in all cultures which is the nature of man, is still different in the sense that the conception of what it is to be human differs from one culture to another. For example, the debate over the nature of man in western culture is still a philosophical puzzle. The debate between the materialist monist and the dualist idealists is a perennial problem yet to be solved in western philosophy. Western metaphysical philosophy tends to be sympathetic to the theory of materialism.

Whereas in other cultures, especially in Oriental and African philosophy, debates about the nature of man is not as controversial as it obtains in Western philosophy and even where controversy abounds, it is very likely that the nature of such controversy is of a different nature from those that can be highlighted in Western culture. In Egyptian philosophy, for instance, the idea of resurrection, in relation to man and his inherent nature was commonplace. If the Nile, Osiris and all vegetation, might rise again, Egyptian philosophy is of the conclusion that man also might rise again (Durant, 1954: 202).

The implication is that man has an immortal aspect distinguishable from his mortality. The body, *ka* and soul could both escape mortality and if cleansed of sin could enjoy the privilege of living forever in the Happy Field of Food – the heavenly garden (ibid.). The truth of this philosophy is one thing, its implication for the kind of jurisprudence likely to hold sway in this kind of conception of man is another.

Again, Murungi's observation also shows that African jurisprudence is a reactive jurisprudence. As a reactive jurisprudence, it is a response to the story about how the African conception of man is being told. In another sense, it can also be decoded that the under representation of any kind of jurisprudence is not borne out of any absence of substance but results basically from a denial of the humanity of a group.

On our part, we tend to argue that the philosophical ideal in African conception of law and the system of rules and governance tends to go in the way of the philosophy of reconciliation, conciliation and restoration of social equilibrium and cohesion. In our estimation, this philosophical ideal tends to incorporate one or two basic elements of what is regarded as therapeutic jurisprudence. As developed by David B. Wexler & Bruce J. Winick therapeutic jurisprudence refers to the "study of the role of the law as a therapeutic agent." In other words, therapeutic jurisprudence focuses on the law's impact on emotional life and on psychological well-being of citizens. In the submission of David B. Wexler & Bruce J. Winick "therapeutic jurisprudence wants us to be aware of this and wants us to see whether the law can be made or applied in a more therapeutic way so long as other values, such as justice and due process, can be fully respected."³

African jurisprudence is essentially therapeutic since law is not only taken as an active social force but most importantly as an instrument for the enhancement and /or restoration of social cohesion and equilibrium. African jurisprudence is essentially therapeutic since it removes the conception of law away from the harsh realities of Austinian jurisprudence or positivist jurisprudence and, instead, emphasises the nature of law in terms of reconciliation and restorative justice. In other words, 'that peace-keeping and the maintenance of social equilibrium' stands at the heart of African jurisprudence. In actual fact, as argued by Elias (1954:8), 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.

In post-apartheid South Africa, with the establishment of the Truth and Reconciliation Committee (TRC) under the Promotion of National Unity and Reconciliation Act of 1995 to deal with the violence and human rights abuses of the apartheid era on a morally accepted basis and to advance the cause of reconciliation, one of the central emphasis and objectives of the Committee was the need to promote social stability which is considered a greater good than the individual right to obtain retributive justice and to pursue perpetrators through the courts. Leading members of the African National Congress (ANC) contended that the "retributive justice" was defined as "un-African."

The committee's chairman was Archbishop Desmond Tutu. In the official discharge of the duty of the TRC, Archbishop Desmond Tutu, in 1996, commented that "God has given us a great gift, *ubuntu*.... *Ubuntu* says I am human only because you are human.... You must do what you can to maintain this great harmony, which is perpetually undermined by resentment, anger, desire for vengeance. That's why African jurisprudence is restorative rather than retributive."⁴

Thus, the reconciliation and restorative justice appears to be veritable and pertinent issues in African philosophy of law. Interestingly, this kind of philosophy of law endorses the view that law and morality are not antagonistic to each other since, by virtue of their inherent origin and development, they both exist to further societal interests, which in the case of African jurisprudence, is the enhancement and maintenance of social cohesion and equilibrium. This is not restricted to the Yoruba society which Adewoye, Elias and Asiwaju have pertinently demonstrated knowledge of. The same can be said of the Barotse of Northern Rhodesia. According to Gluckman,

When a case came to be argued before the judges, they conceive their task to be not only detecting who was in the wrong and who in the right, but also the readjustment of the generally disturbed social relationships, so that these might be saved and persist. They had to give a judgement on the matter in dispute, but they had also, if possible, to reconcile the parties, while maintaining the general principles of law (1967:28).

CONCLUSION

The problematic of the African jurisprudence project is multifarious. The multifarious nature of these problems is animated by the quest for relevance. This quest stems from one end of intellectual consideration to another. In other words, it arises both from the problematic of substance and that of method. But while the problematic of method is far reaching in that African jurisprudence still requires a method for its activation and intellectual clarity, the problematic of substance only needs to be excavated. It requires an honest uncovering of Africa's past. It does not, however, warrant the sceptical conclusions often peddled that Africa has no past. The Oxford historian Professor Hugh Trevor-Roper notoriously exclaimed 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 (1964:9)

There is more to Africa's past than darkness. Regardless of the sceptical frame that is often brought to bear on the intellectual comprehension and significance of the African past, we cannot arrive at a universal theory of the history of man in general without an apt reckoning of the African phase and dimension in man's total existence. As argued by Lewis Taylor (1968: 150), "no empirically sound general theory of society can be elaborated unless account is taken of every known form of man's existence in society." The African person and mind, it is not preposterous to argue, is not a modern or European invention but a product of a particular, distinct and significant history.

Both the sceptical and absence arguments are seriously flawed in their conclusions about the reality and existence of African jurisprudence. It is our contention and conclusion that both the sceptical and absence arguments are based on ignorance about the nature of African realities and that to that extent, fails in demonstrating the non-existence of African philosophy of law in as much as they do not prove beyond all doubts whether indeed Africans lack a philosophical ideal with respect to the nature of governance and legal administration. According to Allot, the claim that African law lacks a philosophical ideal can be attributed to the problem of ignorance by outsiders who lack sympathy and knowledge. In his words,

Some deny the character of law to Africa altogether; others declare that, if there were legal rules in African societies, those rules and their administration are or were characterised and dominated by belief in magic and the supernatural blood-thirstiness and cruelty,

rigidity and automation, and an absence of broader sentiments of justice and equity (1960:55).

From Allot's observation, it is safe concluding that both the sceptical and absence arguments are really presumptive in their various claims rather than factual. To make a factual claim about the denial of African jurisprudence is to exhaust all available evidences, a fact which is evidently missing in both the sceptical argument and the absence thesis. In fact, it has been established that both arguments are not founded on the true principles of empirical history which are experience and observation. The conclusions of these two arguments only elaborate what can be conveniently called a distorted interpretation of history which does not contribute to the making of authentic interpretation of Africa's participation in history.

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¹ African Philosophy, Internet Material, www.google.com.

² Quoted in Will Durant, *op. cit.*, p. 686-7.

³ David B. Wexler & Bruce J. Winick, "Therapeutic Jurisprudence Defined" <http://www.brucewinick.com/TherapeuticJurisprudence.htm>

⁴ Quoted in Wilson, R. "Challenging Restorative Justice" in *Human Rights Dialogue*, Series 2, No. 7, winter 2002.