

# Reinvigorating African values for SADC: The relevance of traditional African philosophy of law in a globalising world of competing perspectives

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## Abstract

*Africa has an important role to play in a globalised world. However, as Africa moves into the playing field, most of its value systems and legal heritage are getting weather-beaten as African governments throw in the towel to forces of Western civilisation and globalisation. It is discernible that this attrition has occurred largely for the sake of expediency and convenience. With a special focus on African traditional philosophy of law, this paper shows that traditional African jurisprudential thinking has been sidelined as being anti-development or too archaic to promote development; or it has been subjected to the so-called universal human rights norms and eroded. Implicit in this approach, and underlining the perception of African governments about traditional legal and value systems, is the evidence of a jurisprudence that remains too Eurocentric and legalistically state-centric; it denies that a postmodern, globality-focused legal scholarship is possible, provided modern African governments adopt pluralist lenses and legislators become legal plurality-conscious in any legislative process. This paper will present a model for the commandeering of an African legal identity, challenging most African states' projects of uniformising globalisation, and highlighting and advocating legal glocalisation and a recognition and respect of the internal diversities of laws across Africa. In this light, the paper shows the strength of African traditional value systems and philosophical thinking as a foundation of African legal systems, highlighting that different discourses have built up around the African traditional legal systems in a modern African state. Thus, after pointing out the scepticism surrounding the existence of African jurisprudential thinking, some important jurisprudential thoughts are explored in a bid to show an Africology of legal philosophy. The paper then advocates a plural, universal epistemology that goes beyond Eurocentrism and other ethnocentrisms.*

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## Introduction

There cannot be regional or continental integration without law or without a common theory of law. From a legal perspective, regional and or continental integration needs a coherent and consistent value system which originates from the people or societies who/which are integrating. If these are necessary ingredients to regional integration, the question arises whether Africans have a theory of law. If so, what is the nature of that theory, and what are its special factual and normative elements? It may be a rather intricate matter to ascertain with certainty the existence of African law – let alone its exact nature, or its factual and normative elements. The existence or absence of African natural law has been obfuscated in an aura of jurisprudential disagreements and is sandwiched between legality and extralegality. These disagreements seem to find their roots in the scepticism about the existence of African philosophy per se – a cynicism which is quite rightly dying a natural death. The scepticism surrounding African moral and value systems sends a message that Africans need to revitalise their value systems discover their ontology and epistemology, and recuperate their lost dignity. This is a message which is important insofar as African continental and regional integration is to be effectively achieved, at least within the Southern African Development Community (SADC).

It is hackneyed to note that a recognition and revitalisation of African values will promote the taste of Africanness and respect for African traditional government systems. To this end, this paper recognises that positivism has long been dominant, but in order to achieve the imperatives of sustainable African integration, it advocates additional recognition of old and new natural laws as law, and especially highlights traditional and socio-cultural normative systems as legal inputs which promote reconciliation, social justice and the rebuilding of African often conflicting, flustered and conked-out societies. In this light, the paper will encourage a modern African government – and especially the legislature – to see law as a complex net of constant negotiation and compromise between competing legal facts of different strengths, reflected in official legal recognition or unofficial legal presence. This position will be taken as a foundation upon which African lawmakers should lay their ideas when legislating in a modern African state, not only in order to prevent the loss of African moral systems and heritage, but also to serve as an environment in which Africans can revitalise their moral and value systems for sustainable integration in a globalising world of competing jurisprudential perspectives.

The goal of this paper is not to trash Western law – a concept which is anyway broad and vague in jurisprudential terms – but to reiterate that African law of the past was never just about custom, and that African laws of the future cannot just be about state-made laws or international norms. Furthermore, instead of African law being regarded as barbaric and repugnant, as former colonisers once saw it as, it should be understood that it is an instrument of harmony and societal integration. Thus, SADC integration can be premised

on African traditional values and legal principles, and, hence, African law is a feasible means by which to advance an Afrocentric approach to African or SADC integration in a globalising world of hostile jurisprudential viewpoints. On this note, globalisation and the Western idea of law are living realities which Africa cannot ignore. The combination of the two sends the message that Africans can only handle current challenges to their heritage in a pluralist manner. Furthermore, when handling traditional norms in particular, Africans should do it constructively in a realistic spirit of legal negotiation with respect for plurality and diversity, rather than fight over competing visions that seek to totally discount other perspectives.

### Conjecture, sceptical theory and the absence thesis

Whenever one talks about the flavour of Africanness or commonality under the theme of integration, important factual and normative questions arise regarding the law across African societies. It appears in global jurisprudence that there is a fixation of positions regarding what is *law* and what is not, or at least what can be accepted as *law* and what cannot. Whereas this fixation of positions exists, the question arises as to whether it is acceptable to conclude that Africa is just a recipient of law without a theory of its own. The other question is whether there is any evidence that Africa is overwhelmingly overshadowed by Western principles. This question comes up as one recognises that there is an inherent philosophy which makes Africans so uncomfortable with accepting positive law modelled on Western design. This unease indicates that there is another theory of law which is often misunderstood by many who subscribe to the positivist-obsessed Western laws. This theory of law deserves the tag *African* – and indeed, such law exists despite scepticism. This position stands as one recognises that the theory of legal positivism is incompatible with African traditional law where the separability thesis does not apply.<sup>1</sup>

### ***Competing philosophical perspectives: A matter of confusion?***

Perspectives about what is and is not *law* have found special attention over centuries, and yet the problem persists. For this reason, African value systems continue to be pushed to the peripheries as being 'extralegal'. At the same time, Africans regard that extralegal system as 'legal'; hence, it is law. There is a realisation that law is one of the greatest institutions and social practices ever developed by humans, and humans originated in Africa – the so-called

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1 This is because any reference to moral considerations in defining the related notions of law, legal validity, and legal system is inconsistent with the separability thesis. Under African law, there is no separation between law and morality. This justifies the view that African traditional law can just as well be regarded as African natural law.

cradle of mankind.<sup>2</sup> Law is a product of cultural development. It represents a major step in cultural evolution.<sup>3</sup> The evolution of culture should actually be taken to have come with the development of a theory of law. The problem with Western scholarship is that there has been an inevitable denial of the existence of African law, let alone the theory of African natural law. This denial, which is unhesitatingly swept aside in this paper, is based on two major points: the absence thesis, and the sceptical argument. Below it is shown in clearer terms that an African philosophy of law indeed exists, and it can be useful in fostering continental and regional integration. Therefore, the absence thesis and the sceptical theory with their positivistic tones should not be accepted as correct positions in global jurisprudence.

During colonial times, African laws existed as a hodgepodge of colonial compromises acceded to by expansionist figures consolidating their conquests. Against this backdrop, the absence thesis posits that there is no African jurisprudence.<sup>4</sup> The non-existence of an African philosophy of law is premised on the non-existence of written records about the law. Is this position tenable? In all societies, the people's philosophy constitutes their system of thought and has always served as the basis for their attitudes on life. In this light, to deny the existence of African law is to deny the premise of African life and the values that underpin it. Philosophy does not exist only in written form, but also in substance and orature. A system of thought does not have to be written in order for a philosophy for it to exist. Thus, it is ridiculous to suggest that, because there are no written records in Africa regarding any jurisprudence, there is no African jurisprudence. In fact, the problem of writtenness is a defect common to almost all legal philosophy, whether in the West, in Africa or the Far East.<sup>5</sup>

Against this backdrop, it should be noted that communication in traditional Africa was and is still orally oriented. There is not much by way of written records to reveal how our ancestors in Africa philosophised about law. Africans living according to their traditional legal systems saw no need to write, as they viewed the spoken word as more effectual than its printed counterpart. This is why, after tracing the history of philosophy, Solomon and Higgins say the following:<sup>6</sup>

2 Idowu, W. 2005. "Scepticism, racism and African jurisprudence: Questioning the problematique of relevance". *An African Journal of Philosophy/Revue Africaine de Philosophie*, XVII:64.

3 (ibid.).

4 Idowu, W. 2006. "Against the skeptical argument and the absence thesis: African jurisprudence and the challenge of positivist historiography". *The Journal of Philosophy, Science & Law*, 6:34–49.

5 Durant, W. 1954. *Our oriental heritage*. New York: Simon & Schuster, pp 556–561.

6 Solomon, RC & MKA Higgins. 1996. *A short history of philosophy*. Oxford: Oxford University Press, p 6.

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.

Closely aligned to the absence thesis is the sceptical argument. The sceptical argument also rests on the premise that there is nothing called *African jurisprudence*. The reason is not that it is not written, but that there is simply no philosophy of law with the tag *African*. In this thesis, there is acceptance of some ordered political systems in African communities, but there is a denial of an African philosophy of law. On the whole, this position is, in reality, Eurocentric scepticism. The nature of this Eurocentric scepticism varies from author to author, however. Driberg, for example, asserts that Africans have no clear conception of *law*:<sup>7</sup>

[S]ymbols of legal authority ... are completely absent, and in the circumstances would be otiose.

Holleman<sup>8</sup> contends that an African jurisprudential frame is missing and lacks an African system of rules; for him, therefore, there is nothing like an African jurisprudence. Similarly, M'Baye<sup>9</sup> states that the rules governing social behaviour in traditional African societies are the very negation of law. In the same vein, Smith<sup>10</sup> postulates that African peoples only know of *customs*, not *law*. The thrust of the theory, therefore, is that, even if Africans had indigenous systems of social control, such systems substantially lacked any trace of legality, legal concepts, or legal elements. This is what Idowu has to say on this score:<sup>11</sup>

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 [to] and controlled by law. Interestingly, the import of these attacks consists in the view that African jurisprudence is at best queasy.

7 Driberg, JG. 1934. "The African conception of law". *Journal of Comparative Legislation and International Law*, 16:238.

8 Holleman, JF. 1974. *Issues in African law*. The Hague: Mouton, p 12.

9 M'Baye, K. 1975. "The African conception of law". In David, R (Ed.). *The legal systems of the world and their common comparison and unification*, Vol. II. New York: International Association of Legal Science, p 56.

10 Smith, MG. 1965. "The sociological framework of law". In Kuper, H & L Kuper (Eds). *Adaptation and development*. Berkeley: University of California Press, p 32.

11 Idowu (2006:4).

Smith premised his claim on the assumption that African rules of societal control and norms could not be distinguished from the rules of polite behaviour dictated by African customs.<sup>12</sup> The basis for these scholars' denial of African jurisprudence in general and African conceptions of law in particular can be partly explained by their display of Eurocentrism on the one hand, and their lack of knowledge and understanding of the African idea of *law* on the other. Gluckman,<sup>13</sup> in consonance with this, writes that the denial of an African conception and system of law is a mistaken position arising from a tradition imbued with ignorance about how the law works among Africans. Africans, he notes, have always had an idea of natural justice, the law and a legal system, even though they may not have developed indigenous practices in abstract theoretical terms.<sup>14</sup>

In a similar manner, Elias defends the thesis that Africans, like other cultural groups of the world – and Western groups in particular, had their own indigenous law.<sup>15</sup> This law, also known as *customary law*, has the same functional capacity as other laws elsewhere. Elias tried to disabuse the minds of colonial writers of their naïve concept of African law. In the course of projecting the resonance of African customary (natural) law, Elias defines *African natural law* as the body of rules which are recognised as obligatory by indigenous Africans.<sup>16</sup> According to him, “laws know no differences in race or tribe as it exists primarily for the settlement of disputes, and the maintenance of peace and order in all societies”.<sup>17</sup> He writes further that –<sup>18</sup>

[t]he two chief functions of law in any human society are the preservation of personal freedom and the protection of private property. African law, just as much as, for instance English law, does aim at achieving both these desirable ends.

If English law or, in broader terms, Anglo-Saxon law can be used in globalising the world and in facilitating regional integration, why should Africans not revitalise their moral and value systems for sustainable African continental and regional integration? African law is a workable system which has better attributes, relatively, for African cultures. Thus, the development of African communities should not negate African law at the expense of other global competing perspectives. This is possible if Africans accept that African

12 Smith (1965:33).

13 Gluckman, M. 1972. *The allocation of responsibility*. Manchester: Manchester University Press, p. 173.

14 (ibid.).

15 Elias, TO. 1956. *The nature of African customary law*. Manchester: Manchester University Press, p 6.

16 Abiodun, BO. 2007. “Towards an African concept of law”. *African Journal of Legal Theory*, 1:73.

17 Elias (1956).

18 (ibid.:33).

jurisprudence is deducible by reason in ontological reflection. This means that the principles of African jurisprudence can be traced from their history, as reasoned by the people themselves in practising their cultures in their communities, and as they interact with other communities across the continent.

From Allott's observation that indeed there is a law with the tag 'African' and such law is unwritten for its development is based on flexible principles and its continued existence is guaranteed by orature, it is safe to conclude at this juncture that both the sceptical and absence arguments are really presumptive in their various claims rather than factual – let alone African.<sup>19</sup> As Idowu<sup>20</sup> says, to make a factual and African 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.<sup>21</sup> Indeed, 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 an authentic interpretation of Africa's participation in it.<sup>22</sup>

There is a need, therefore, for an Africology of law: an African renaissance, to uncover Africa in jurisprudence and the cosmology in which it developed. The argument is that there is African traditional law, and it is useful in forming a jurisprudential background and/or foundation to African continental and regional integration. And if African moral and value systems are sidelined as extralegal then we need to revitalise and champion them. I argue here that it is possible to define *African law* and to revitalise those systems that are always sidelined in mainstream jurisprudence. The fact that African law is not written is in itself an indication of the existence of African enlightened jurisprudential thinking. The sceptical argument and the absence thesis have lost momentum with the rise of an African intellectual ecstasy that has engulfed academia in this globalising world, and which will be dealt with in more detail when African philosophical thinking is decoded below. But whereas the world is globalising, the principles of African law and its value systems as well as African natural laws can be glocalised. In other words, with African value systems, we can still have an interplay of local–regional–global legal interactions in a spirit of liberality.

### ***The existent part of the non-existent***

It is imperative at this point to consider the existence of the part of African jurisprudence which is being denied. What is the relevance of an African

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19 Idowu (2006:36).

20 (ibid.:37).

21 (ibid.).

22 (ibid.:4).



jurisprudence for the process of integration and legal development in Africa? In the first place, it is necessary to understand the meaning of *jurisprudence*. Etymologically, the term *jurisprudence* comes from the Latin *juris*, meaning “law”, and *prudential*, meaning “skill”. Thus, it means “a knowledge of, or skill in, law”, and refers both to a philosophy or a system of law as well as to the skill of practising law.

African traditional law and its value systems are part of African jurisprudence or a product thereof. In order to understand what *African traditional law* is, an acceptable starting point would be to consider African ontology and the unique characteristics of the social institutions that evolved from that ontology because “the African legal tradition is a direct outcome of African ontology”.<sup>23</sup> *African ontology* means the African folk cosmology: the traditional African view of the universal order, and humankind’s place in it.<sup>24</sup> As Okafor postulates, the —<sup>25</sup>

... morphology of African ‘reality’ and its concept of ‘existence’, show that there is an intimate ontological relationship between beings.

In other words, the African traditional world view recognises that there is “active interaction, a kind of inter subjective communion”<sup>26</sup> among the various entities that constitute the universe. These are premised on well-arranged legal institutions applying normative concepts of African jurisprudence, especially African natural law. These concepts will be dealt with in more detail below.

## Glocalising the African mind: African musing on the junction of local–regional–global legal interactions

It has always been a challenge for Africans to ‘think global and act local’. Therefore, the process of glocalisation is a hurdle when it comes to sustainable African regional and continental integration in this world of competing jurisprudential perspectives. As a background and especially in the context of Africa, the glocalisation approach suggests that reconsidering frames of reference and order schemas is useful for both global and local research and management. Indeed, the global and local are really two sides of the same coin, as a place may be better understood by recognising the nature of glocalisation as a continuum. African moral values and systems

23 Okafor, FU. 1984. “Legal positivism and the African legal tradition”. *International Philosophical Quarterly*, 24(2):161. Generally, see also Okafor, FU. 1992. *Igbo philosophy of law*. Enugu: Fourth Dimension Publishing Company.

24 (ibid.:23).

25 (ibid:161).

26 (ibid.).



can be viewed and revitalised in this context if the ability to 'think global and act local' is cultivated. The problem with most African legislators is that they tend to be clouded with imperatives from abroad, especially the forceful West. These imperatives, though alluring to African legislators, are not necessarily acceptable to the populations of the countries they serve. Thus, —<sup>27</sup>

[t]he importance of building effective legal and regulatory systems has long been recognized by development professionals, yet there have been few programmatic initiatives that have translated empirical evidence and political intention into sustained policy success. A key reason is that such efforts have too often consisted of top-down technocratic initiatives that have inadequately appreciated the social and cultural specificity of the particular context in which they operate, as well as the complexity of the systems they have attempted to create. Justice sector reforms have frequently been based on institutional transplants, wherein the putatively 'successful' legal codes (constitutions, contract law, etc.) and institutions (courts, legal services organizations, etc.) of developed countries have this been imported almost verbatim into developing countries.

Sustainable regional and continental integration should have glocalisation as its close companion. *Glocalisation*, which is a portmanteau of the terms *globalisation* and *localisation*, describes a situation whereby foreign systems are adapted to local systems. In international economic law, glocalisation occurs where a product or service that has been developed and distributed globally is also fashioned to accommodate the user or consumer in a local market. In jurisprudential terms, therefore, the so-called universal principles of law – or, more precisely, universal principles of human rights – can be tailored to conform to local laws, customs or cultural preferences. Such an in-built system will be more acceptable to the local user or applier of the law than to the external educator who may try to impose the new external system.

A good example of this is traditional justice systems. Examples of such systems which have appeared in various publications across the world are the *Dare raMambo* of Zimbabwe, the *Gacaca* of Rwanda, the *Sungusungu* of Tanzania and the *Bashingatahe* of Sudan. These systems endured and survived colonial brutality and have continued to thrive in post-colonial and post-conflict periods. The relative success of these traditional institutions indicates that African traditional law and values, despite being manipulated as tools by the colonial powers to serve their own interests,<sup>28</sup> such systems knew how to manoeuvre their way around such control. African jurisprudence was preserved, therefore, with few but noticeable bruises. In Namibia and South

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27 Chirayath, L, C Sage & M Woolcock. 2006. "Customary law and policy reform: Engaging with the plurality of justice systems". Available at <http://www.rrojasdatabank.info/wir2006/chirayath.pdf>; last accessed 27 March 2011.

28 Mamdani, M. 1996. *Citizen and subject: Contemporary Africa and the legacy of late colonialism*. New York: Princeton University Press, p 17.

Africa, for example, the former South African apartheid government's Native Administration Proclamation, which was transferred to Namibia in the 1920s, discriminated between blacks and whites in inheritance and marriage issues, but it was never followed in practice in the localities it was intended to affect. In this way, African customary law and its philosophy triumphed.

In East and West African colonies such as Italian Somaliland, a similar situation reigned. Royal Decree No. 695 of 1911 proclaimed Italians were governed by their own domestic law while Somalis were subject to 'native law'. At face value, this 'native law' appeared to be an indigenous institution that remained largely dictated by Somalis themselves;<sup>29</sup> in fact, however, it was a compromise arrived at with some thinking akin to glocal orientation. In most British colonies, the British colonial leadership masked their intention to usurp African customs as a mechanism of control<sup>30</sup> by appointing Africans to serve as administrators of a 'Native Authority' where these mechanisms would be used against their fellow citizens. This explains why the British used the repugnancy clause to regulate the application of African laws, as opposed to the assimilationist policy of the French and Italians. However, the repugnancy clauses did not do away with African laws: Africans instead created *official* and *living* customary law. *Official* customary law was that which was in conformity with the principles of natural justice and the public policy of colonial masters, whereas *living* customary law was that which was in contradiction with the laws of the colonial masters, but was nonetheless followed by traditional communities. As the substance of the law was subordinated to the quest for order, the claim to be bringing the 'rule of law' to Africa became the handmaiden of the imperative to ground power effectively. Thus, as Shihata suggests, an effective legal reform programme —<sup>31</sup>

... must also include such legislative, administrative, and judicial reforms as may be needed to ensure that the rules will be changed to serve the public interest, will be applied in a correct and fair manner ..., will be complemented by the necessary regulations and interpretations ... and will be subject to future reviews to ensure their continued relevance and usefulness.

Therefore, African legal reforms need to be cognisant of processes and outcomes to ensure efficiency, fairness, and non-arbitrariness.<sup>32</sup> To implement

29 Tatten, S. 2009. "The olive branch? The role of a Somali justice system in the quest for peace". In Hinz, MO (Ed.) in cooperation with C Mapaure. *In search of justice and peace: Traditional and informal justice systems in Africa*. Windhoek: Namibia Scientific Society; Mamdani (1996:114).

30 Mamdani (1996:118); Tatten (2009).

31 See Shihata, IFI. 1995. "Legal framework for development: The World Bank's role in legal and judicial reform". In Rowat, M, WH Malik & M Dakolias (Eds). *Judicial reform in Latin America and the Caribbean: Proceedings of a World Bank Conference*. Washington, DC: World Bank, pp 13–15.

32 (ibid.:3).

reform, particularly in countries in transition or embroiled in trauma, the role of the state needs to be redefined. This redefinition does not mean dismantling the state as it exists in Africa, but reorienting the thinking of African leaders, especially in respect of legal and policy formulation in the global jurisprudential context. In other words, concerted glocal thinking by politicians and technocrats in African governments which is based on African jurisprudence will help in achieving sustainable continental or regional integration.

The main criticism levelled against African traditional justice systems is that they do not ascribe to international fundamentals of fair trial and equality.<sup>33</sup> These principles have their foundations in the Universal Declaration of Human Rights, to which not one African country had an input. This explains why the preaching of human rights from this perspective has always been considered as an imposition of Western concepts on Africa. Imposing formal mechanisms on communities without regard for local-level processes and informal legal systems may not only be ineffectual, but can actually create major problems – hindering uniform African glocal thinking in this world of competing jurisprudential perspectives. Thus, it should be noted that failure to recognise different systems of understanding about law may in itself be discriminatory or exclusionary. Therefore, there are often very good reasons why many people chose to use informal or customary systems, and this should be considered and understood<sup>34</sup> in order to sustainably revitalise African values for continental or regional integration.

### Thinking like an African: Revitalising African jurisprudential concepts in a world of competing perspectives

Globalisation presents an omnipresent veneer insofar as we appreciate general jurisprudential thinking across the world. Yet, in many cases, local forces work to attenuate the impact of global processes. These forces are recognisable in efforts to prevent or modify the plans to totally embrace African value systems, while recognising acceptable global trends for the betterment of African continental and regional integration projects.

In order to appreciate African jurisprudential claims, it is important to put on a pair of Afrocentric goggles. Sustainable African continental and regional integration and societal cohesion should be informed by flexible Afrocentrism. *Afrocentrism*, in jurisprudential understanding, is a world view that considers African people, their values, cultures, histories, collective struggles, needs and aspirations to be central to the interpretation and utilisation of their normative

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33 Mapaire, C. 2010. "Accused and cherished: Traditional and informal justice systems as seen by international organisations". In Hinz & Mapaire (2010:43–44).

34 Chirayath et al. (2006:5).

concepts. Afrocentrists commonly contend that approaching knowledge from a Eurocentrist perspective, together with certain mainstream assumptions applied to information in the West, has led to injustices and inadequacies in meeting the needs of African people – here meaning indigenous black Africans and those in the African diaspora. The Afrocentrist paradigm therefore seeks to discover and reinterpret information through African eyes, utilising it in ways that ensure benefit to Africans. What follows below is an exposition of some of the philosophies relevant to African jurisprudence, as developed from Afrocentrist philosophical thought.

### **Ubuntu: African human rights?**

The celebrated concept of *ubuntu* (Zulu) or *unhu* (Shona), for example, is a typical African human rights jurisprudential concept. *Ubuntu* generally means “humanity towards others”. In the case of *S v Makwanyane & Another*, it was explained that an outstanding feature of *ubuntu* in an African community sense is the value it puts on life and human dignity. The dominant theme of African cultures is that the life of another person is at least as valuable as one’s own. This means that respect for the dignity of every person is integral to the concept of *ubuntu*. Although Western scholarship is replete with the belief that Africa is a continent that loves violence and conflict, during such turbulent times, distraught members of society decry the loss of *ubuntu*. Thus, heinous crimes are the antithesis of *ubuntu*. Treatment that is cruel, inhuman or degrading is bereft of *ubuntu*,<sup>35</sup> i.e. African human rights premised on reconciliation, dignity, and respect for human life.

In addition to the above, *ubuntu* speaks to African interconnectedness, a common African humanity and the responsibility to each that flows from an African connection. *Ubuntu* is an African cultural and philosophical concept that emphasises the commonality and interdependence of members of a community. It recognises a person’s status as a human being entitled to unconditional respect, dignity, value and acceptance from the members of the community to which s/he belongs. Courts in South Africa and elsewhere have held that *ubuntu* needs to become a notion with particular resonance in the building of African constitutional democracies.<sup>36</sup> In itself, *ubuntu* is a revitalisation of African values and moral principles. This concept was born and bred and is evolving in Africa; thus, it owes much to African traditional law. African societies have suffered greatly in the process of making laws and identifying themselves from a legal point of view,<sup>37</sup> but their lasting value

35 See *S v Makwanyane & Another* 1995 (6) BCLR 665; 1995 (3) SA 391; [1996] 2 CHRLD 164; 1995 (2) SACR 1, at paragraph 225.

36 See *South African Broadcasting Corporation Ltd & Another v Mpofu* (Unreported case A5021/08, decided on 11 June 2009, at paragraph 63.

37 Ramose, MB. 1999. *African philosophy through ubuntu*. Harare: Mond Books, p 43.

orientation in *ubuntu* holds up an alternative in the sense that this uniquely African concept advocates a renewed concern for the human person.

The above point is made more succinct by Van Binsbergen:<sup>38</sup>

*Ubuntu* as a form of African philosophy thus blends in with other potential, imagined or actual gifts of Africa to the wider world: African music and dance, orality and orature, kingship, healing rituals in which trance and divination play major roles, a specific appreciation of time, being and personhood – all of them cultural achievements from which especially the North Atlantic could learn a lot and (to judge by the latter's dominant forms of popular music and dance throughout the twentieth century) is increasingly prepared to learn, in a bid to compensate such spiritual and corporeal limitations and frustrations as may be suspected to hide underneath the North Atlantic's economic, technological, political and military complacency.

Viewed as a moral and political exhortation and an expression of hope for a better future, *ubuntu* – just like *humanism*, to be discussed below – creates a moral community, admission to which is not necessarily limited by biological ancestry, nationality, or actual place of residence.<sup>39</sup> To participate in this moral community, therefore, is not a matter of birthright in the narrower, parochial sense. If birthright comes in at all, it is that of any member of the human species to express concern vis-à-vis the conditions under which their fellow humans must live, and to act on that basis.<sup>40</sup> This moral community consists of people sharing a concern for the present and future of a particular local or regional society, seeking to add to the latter's resources, redressing its ills, and searching its conceptual and spiritual repertoire for inspiration, blueprints, models, and encouragement in the process. Thus, *ubuntu* cannot exist in a society driven by purely positivistic principles which form the mainstream thinking of the West. The success of *ubuntu* in Africa will only be had if principles of African natural law are maintained. In fact, the concept in itself embodies African traditional law principles which have to be enforced from an Afrocentric perspective in order to integrate societies divided by colonialism and apartheid. In South Africa, this is referred to as the *programme of the African renaissance*.<sup>41</sup>

38 Van Binsbergen, WMJ. 2001. "Ubuntu and the globalisation of southern African thought and society". In Van Binsbergen, WMJ (Ed.). *Intercultural encounters: African and anthropological lessons towards a philosophy of interculturality*. Berlin/Muenster: LIT, p 6.

39 (ibid.:8).

40 Incidentally, the inclusive principle identified is part of African societal normative systems at village level, where, for instance, every adult has the obligation, but also the right, to guard over the interests of all children, regardless of the specific genealogical ties between adult and child.

41 Van Binsbergen, WMJ. 2010. *Ubuntu and the globalisation of southern African thought and society*. Available at <http://www.shikanda.net/general/ubuntu.htm>; last accessed 12 June 2010. See also Mbeki, G. "Towards the African renaissance". In

*Ubuntu* has to be aided by the central concept of Afrocentricity, a notion which itself seeks to protect African values, thus creating such moral community for the revitalisation of African morals and values. This includes the cultivation of concepts such as *ubuntu*, focusing not on a particular locality or region, but on the African continent as a whole.<sup>42</sup> The people implicated in this way may be expected to identify with each other and consolidate the pursuit of their concern.<sup>43</sup> Whoever sets out to publicly deconstruct and even debunk the available conceptual and spiritual repertoire, dissociates from this moral community, rents its fabric, and jeopardises its project and the project of African integration.

### ***Humanism: African Christian jurisprudence?***

In 1967, Kenneth David Kaunda, during his presidency of Zambia, declared his policy of humanism, which was a mixture of Christian ethics and socialism. The policy evolved into a school of philosophical thought now widely referred to as *Christian humanism*. Indeed, Kaunda called himself a “Christian humanist”.<sup>44</sup> This was a Christian philosophy with an African flavour because it was heavily laden with African natural law principles. In this philosophical concept, Kaunda stressed the importance of the centrality of humanity while embracing a progressive conception of Christian jurisprudence in an African context that incorporated principles of African culture. Kaunda is one of the few black African humanists. Bill Jones makes the point that black humanists reflect upon their own circumstances when developing their world view:<sup>45</sup>

... black Humanism emerges as part of a debate that is internal to black life and thought. It is not a spin-off of the enlightenment, the scientific revolution or, as Deotis Roberts has suggested, a borrowing from Comte. Rather, as Benjamin Mays, an eminent representative of black Christian theism, has correctly perceived, black incredulity about the divine, as well as agnosticism and atheism “do not develop as the results of modern science, nor from the observations that nature is cruel and indifferent; but primarily because in the social situation, [the black American] finds himself hampered and restricted ... Heretical ideas of God develop because in the social situation the ‘breaks’

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Hadland, A & J Rantao (Eds). *The life and times of Thabo Mbeki*. Rivonia: Zebra/Southern/New Holland Struik; Diop, CA. 1996. *Towards the African renaissance: Essays in African culture and development 1946–1960*. London: The Estate of Cheikh Anta Diop & Karnak House, pp 33–45.

42 Van Binsbergen (2010:10).

43 See Asante, MK. 1987. *The Afrocentric idea*. Philadelphia: Temple University Press, p 24.

44 *The Economic Justice Monitor*, 1998, 1(13):3. See also Smith, RD. 1999. “Missionaries, church movements, and shifting religious significance in the state of Zambia”. *Journal of Church and State*, 41(3):525–550.

45 Jun, NA. 2007. “The role of humanism in promoting African unity and identity”. Available at <http://www.iheu.org/node/1568>; last accessed 23 March 2011.

seem to be against the Negro and the black thinkers are unable to harmonize this fact with the God pictured by Christianity.

From the foregoing it is easy to see that humanism and *ubuntu* are not primarily factual descriptions. These concepts essentially express the speaker's dreams about norms and practices that allegedly once prevailed in what are now to be considered peripheral places,<sup>46</sup> while the speaker her-/himself is situated at or near the national or global centre. Van Binsbergen<sup>47</sup> postulates that such dreams about the past and the periphery are articulated not because the speaker proposes to retire there personally or wishes to exhort other people to take up effective residence there, but because of their inspiring modelling power with regard to local, national and even global issues – in other words, because of these dreams' alleged persuasive/perlocutionary nature outside the peripheral domain in which they are claimed to originate and to which they refer back. As he puts it, –<sup>48</sup>

[i]f, thirty years later, I have much less difficulty in identifying, in my capacity as a social actor in a concrete Southern African setting, with Zambian humanism, and with *ubuntu*, it is because I have enjoyed, for these many years, the (part-time) membership of the kind of local communities by distant reference to these two ideologies have been constructed in the first place.

Throughout the 1970s and 1980s, Africa learnt that humanism was not so much a legally binding system of law but more an implicit and diffuse value system which informed the lives of the people. It was in terms of this very value orientation that Africans were allowed to share their lives – despite frequent transgressions both on the part of the colonisers and the colonised, and on the part of apartheid enforcers and the oppressed. This admission on both sides of the communities has been one of the greatest sources of pride and joy that underline humanism – as it does *ubuntu*. From this, there is no doubt that the success of humanism can only be realised if principles of traditional law in an African context have been revitalised and embraced.

### **Negritude: *The flavour of being African***

In 1990, Leopold Sedar Senghor, the former Senegalese President, was elected to the International Academy of Humanism. The Academy is composed of humanists that are committed to free inquiry, the scientific methods of investigation, and the furthering of humanist ethical values and principles. Senghor was largely responsible for popularising the term *negritude*, a way of

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46 Notably, within the intimacy of allegedly closely knit villages, urban wards, and kin groups.

47 Van Binsbergen (2010:10).

48 (ibid.:10).



identifying with 'blackness' without having to draw upon culture, language, or nationality.<sup>49</sup> *Negritude*, as interpreted by Senghor, encompasses –<sup>50</sup>

... the whole of the values of civilization – cultural, economic, social, and political – which characterize the ... Negro African World.

Senghor admitted that negritude was spirit-centred and marked by a characteristic rhythm and symbolism:<sup>51</sup>

There is a certain flavor, a certain odor, a certain accent, a certain black tone inexpressible in European ... [languages].

Inspired by African values, and elements of African traditional law in a world of competing legal perspectives, Senghor's particular brand of negritude was largely a neo-African cultural challenge in which he equated cultural by-products such as art as a marker of civility.<sup>52</sup> This connects clearly to Okafor's assertion that African jurisprudence can only be understood in the context of African ontology.<sup>53</sup> Once this happens, we are apt to have claims that *ubuntu*, humanism or negritude are racist. This is what happened to Senghor, because negritude surfaced partly from French colonial rejection. Therefore, negritude could be regarded as a product of an African inferiority complex, although Senghor retorted that negritude was neither self-hatred nor racialism.<sup>54</sup> Yet, considering Senghor's negritude against the Western notion of a universal civilisation, it becomes clear that his quest "to assimilate, not be assimilated" indicates a more inclusive civilisation rather than sheer mimicry of Western concepts.<sup>55</sup>

Senghor's cultural policies in Senegal reflect that the negritude schemata is fully aware of the Africans' potential power to create and define their own images.<sup>56</sup> For example, inaugurating the Ecole de Dakar, a school of art in Senegal, it was clear that he wanted Africa to have "a certain active

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49 Wilder, G. 2005. *The French imperial nation-state: Negritude and colonial humanism between the two World Wars*. Chicago: University of Chicago Press, p 32.

50 Colvin, LG. 1981. *Historical Dictionary of Senegal*. Metuchen, NJ: The Scarecrow Press, Inc., p 229.

51 Vaillant, JG. 1972. "Perspectives on Leopold Senghor and changing the face of negritude". *ASA Review of Books*, 2:158.

52 Sidney, L & RDG Kelly (Eds). 1994. *Imagining home: Class, culture, and nationalism in the African diaspora*. London: Verso, p 87.

53 Okafor (1984:161).

54 (ibid.:162).

55 Bunnin, NEP & E Tsui-James (Eds). 1996. *The Blackwell Companion to Philosophy*. Cambridge, MA: Blackwell Publishers Ltd, p 575

56 Campbell, CZ. 2006. "Sculpting a pan-African culture in the art of negritude: A model for African artist [sic]". *The Journal of Pan African Studies*, 6:33.

presence in the world, or better, in the universe”.<sup>57</sup> This indicates the spiritual and cosmological link between African values and African identity and culture. In this light, Senghor called African art a constructive “spiritual food”, parallel with the aim of being.<sup>58</sup> Skurnik argued that Senghor’s artistic vision propelled Africans from mere consumers/recipients to creators/producers of a civilised world.<sup>59</sup> Showing the foundation of negritude as African natural law, Senghor illustrates that African art held the possibilities of dignity, necessity and sustenance for the future via negritude,<sup>60</sup> with his stance on African culture catalysing a national Senegalese identity within African nationalism and African socialism.<sup>61</sup> Therefore, African socialism can be regarded as an offshoot of African traditional law – an interesting relationship which needs deeper analysis.

### ***Consciencism: The principle of African liberty?***

Nkrumah’s (1970) publication entitled *Consciencism: Philosophy and ideology for de-colonization with particular reference to the African revolution*<sup>62</sup> is pre-eminently a work in socio-political philosophy, but it remains helpful in exhuming some important concepts of African traditional legal thought in a world of competing perspectives. Nkrumah’s conception of *African particularity* does not warrant the presumption that African and European cultural differences are mutually exclusive. Rather, as Oruka insightfully observes, –<sup>63</sup>

... one remarkable characteristic of this [African professional] philosophy is that it employs techniques commonly associated with European or Western philosophy. Yet, contrary to the general claim, such techniques are not unique to the West.

Consciencism formed the foundation of African nationalism, which drove the process of decolonisation. Hence, the underlying principle is that of the human right to liberty.

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- 57 Senghor, LS. 1995. “Negritude: A humanism of the Twentieth Century”. In Hord, Frederick L & Jonathon Scott Lee (Eds). *I am because we are: Readings in black philosophy*. Amherst, MA: University of Massachusetts Press, p 46.
  - 58 (ibid.).
  - 59 Skurnik, WAE. 1965. “Leopold Sedar Senghor and African socialism”. *The Journal of Modern African Studies*, 3:365.
  - 60 Campbell (2006:34).
  - 61 Skurnik (1965:367).
  - 62 Generally, Nkrumah, K. 1970. *Consciencism: Philosophy and ideology for de-colonization with particular reference to the African revolution*. London/Accra/ London: PANAF Books/Hensteeve Publications Ltd/Heinemann, p 86.
  - 63 Odera Oruka, H. 1983. “Sagacity in African philosophy”. *International Philosophical Quarterly*, 23: 391; McClendon, JH. 2003. “Nkrumah’s consciencism as philosophical text: Matters of confusion”. *Journal of African Philosophy*, 3:48.

The notion of *consciencism* is helpful in the implementation of integration as regards regions of the African continent in general. Nkrumah founded the Organisation of African Unity (OAU) with this philosophical thought underlying the process. To Nkrumah, the process of decolonisation was to be followed by unity among the decolonised.<sup>64</sup> He felt that the decolonisation process also had to permeate the school curricula. This was because the curricula in most independent African states were starved of sustenance in subjects such as history, as students were introduced to Greek and Roman history – the cradle of modern Europe – only. Students were also encouraged to treat this Greek and Roman story of humankind together with the subsequent history of Europe as the only worthwhile history.<sup>65</sup> Indeed, Greek and Roman history is anointed with a universalist flavouring which titillates the palate of certain African intellectuals and politicians so agreeably that they become alienated from their own immediate society. Indeed, this placation or pacification of traditional African law cannot lead to sustainable regional and continental integration.

African history, according to Nkrumah, would conscientise the African mind and instil a spirit of African nationalism in the hearts of those who appreciated that history.<sup>66</sup> Therefore, it is important to learn African history and the philosophy that comes with it. This will help shed the scepticism that accompanies the existence of an African philosophy of law. Because of Nkrumah it is clear that, once someone has come to appreciate African philosophical thought, s/he will be in a position to champion regional and continental integration based on the laws and the values that underlie it – being values which are home-grown. This appreciation will then lead to an integrated continent with people who know where they are heading in regard to the protection of their heritage and, especially, legal philosophical thought, which is necessary for a productive society. Furthermore, the dependence on African values for continental and regional integration will ensure an Africology of knowledge production<sup>67</sup> necessary for further development and appreciation of those other competing perspectives.

Notably, Nkrumah's philosophical practice, from an ethnophilosophical assessment, more approximates the Western prototype – although it assumes the character of an African Marxist philosophical text. In this

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64 Nkrumah (1970:88).

65 (ibid.).

66 (ibid.:88).

67 This is "the scientificity of studying and generally investigating historical phenomena in which African achievements are properly recognised and appropriated as such by all humanity;" see Nabudere, DW. 2006. "Towards an Africology of knowledge production and African regeneration". *International Journal of African Renaissance Studies*, 1:7.

sense, Nkrumah's stance opposes the bourgeois academic philosophy<sup>68</sup> of the West. His professional philosophical outlook has a dialectical relation to ethnophilosophy. McClendon comments correctly that –<sup>69</sup>

Nkrumah's adoption of the Marxist philosophical problematic over and against African metaphysical exclusivism was the *tour de force* that sustained his particular professional mode of discourse.

McClendon adds that –<sup>70</sup>

[n]onetheless, when particularity is conflated with African exclusivism, we discern that texts in African philosophy assume the determinate character of ethnophilosophy. For instance, WE Abraham's *The Mind of Africa* and/or Julius Nyerere's *Ujamaa* are closer to ethnophilosophy. Nkrumah departed from this philosophical tradition and its idealist ontological foundation. Those readers who identify a philosophy of particularity with ethnophilosophy are bound to be lost when approaching his text. For in *Consciencism*, rather than describe how the Akan conceptualizes the nature of being as pivotal to philosophical practice, Nkrumah instead scrutinized and inquired into such philosophical problems as the contradiction between materialism and idealism and the dialectical process of categorial conversion. [Emphasis in original]

Clearly, that the intrinsic value of African moral and value systems is uppermost for Africans who have suffered the scourges of colonialism and apartheid. Their clarion call – “Philosophy for the sake of philosophy” – means African legal philosophical thought should not be lowered from the cultural clouds of speculation into the contaminated terrain of material practice.<sup>71</sup> Nkrumah himself writes and repeats that philosophy is a purely legal and cultural product not to be used as a means to any other end, and that it is a product of a specific legal and cultural heritage.<sup>72</sup> Given that some philosophers philosophise about African philosophy from outside, Nkrumah says that such philosophies are bereft of African social, legal and political conditions; such conceptions of philosophy can only assume an alienated form, an exclusivist approach, which will not aid in the revitalisation of African values and moral systems in a world of competing perspectives.<sup>73</sup> Thus, Nkrumah and Kaunda, as the Fathers of Africa, have their theories and ideologies married here. The commonality in the two philosophical approaches is a clear reflection of the value of African ontology, the principles of African value systems, and traditional law in contemporary African jurisprudence. These approaches can be reinvigorated and used by contemporary African leaders to achieve unity and tolerance of diversity – and, hence, cohesion and integration.

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68 McClendon (2003:3).

69 (ibid.).

70 (ibid.:4).

71 (ibid.).

72 Nkrumah (1970:5, 55, 63).

73 (ibid.:55).

## Afro-glocalisations: 'Thinking global' and acting as legal pluralist Africans

Having looked at African traditional law from a global jurisprudential perspective, and having looked at African attempts at revitalising African moral systems, how can we now develop jurisprudence inclusive of global as well as local perspectives? In other words, how can Africa revitalise its value and moral systems and include competing perspectives? Is it possible to be Afrocentric and global at the same time? In this modern world, where the Bretton Woods institutions and other Western donor institutions always speak of 'good governance' when it comes to the extension of credit and aid to Africa, is it possible to balance competing legal perspectives? Or, at least, is it possible for Africa to accommodate universal human rights principles in the context of African traditional law, and African ontology and epistemology? The theory below seeks to strike this balance by advocating a consciousness of legal plurality in the treatment of competing perspectives, and in the creation of a viable environment for the revitalisation of African moral and value systems for sustainable continental and regional integration.

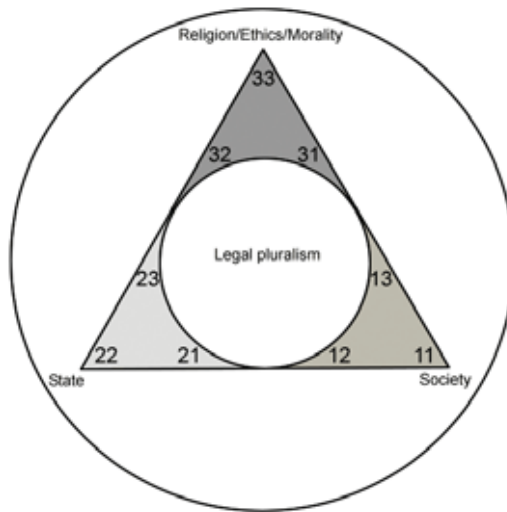
Acceptance of universal principles of law – or at least of universal principles of human rights law – has been advocated as being pro-development, while traditional systems are seen as too archaic to accommodate such progress. This Western idea promotes the notion that all legal systems, whether unitary or plural, are obliged to conform to all so-called universal standards of human rights. For this reason, what is wrong in African traditional thought should be purged and cast asunder. In this view, the West and its jurisprudence are to be taken as a universal and conclusive referent in all legal discourses. This perspective ignores the fact that the Western legal thought is a positivism-obsessed centre of cultural imperialism, reflected in the following example of disastrous advice given to the Ethiopian Government by Western experts:<sup>74</sup>

Modernise as fast as you can, get rid of anything African as fast as possible, and join us, the West, on the global train through history, which alone leads to development.

However, the other competing perspective is that, if the legal system of the larger society respects human rights norms, and if indigenous people accept these norms, there is no need to maintain legal pluralism. But even where there is a consensus on human rights norms, there may still be a valuable role for legal pluralism. These are competing perspectives which should be married, and the marriage should be characterised by constant negotiation in an uneasy yet feasible pluralism.

<sup>74</sup> See Menski. W. 2006. *Comparative law in a global context: The legal systems of Asia and Africa* (First Edition). Cambridge: Cambridge University Press, p 491.

Against this backdrop, it is trite to consider that African legislators and political leaders have to wear pluralistic legal goggles in legal reforms and governance, respectively. This position is supported by Menski's tripartite and tetrahedron theory of law.<sup>75</sup> Menski suggests that law everywhere is a kind of superstructure, built out of and feeding on elements that may only partly be recognised as 'legal', such as statist power, morality and ethics, socio-economic norms, and historical structures.<sup>76</sup> Menski illustrates this in a triangular structure that incorporates the three major theories of law that have been developed over time in many different more or less pure manifestations.<sup>77</sup> Diagrammatically, this theory is presented as follows:



**Figure 1: Menski's Triangular Interactive Model of Jurisprudence**

## Menski's Tripartite Theory of Law

The Triangular Interactive Model of Jurisprudence<sup>78</sup> constitutes the internally plural semi-autonomous field of all law representing global legal realism, with no single angle dominating any of the others. This is a good environment in which African dignity can recuperate and African moral systems can be revitalised. This pluralism, graphically represented in a series of triangles and circles (see

75 Menski, W. 2008. *Comparative law in a global context: The legal systems of Asia and Africa* (Second Edition). Cambridge: Cambridge University Press, p 611.

76 Menski (2008:612).

77 (ibid.).

78 (ibid.:445).

Figure 1),<sup>79</sup> shows natural law at the apex, embodying religion/morality/ethics. Legal positivism represents state laws in the bottom left corner, while societal values and socio-legal approaches arise from the bottom right corner. In the explanations of this tripartite theory of law, Menski depicts legal uniformity as a myth and global uniformisation as a partial reality. Since the world will never have one uniform law, and there is no global agreement on the definition of *law*, a “plurality-conscious negotiation of competing perspectives in a spirit of liberality”<sup>80</sup> seems necessary. While positivism has reigned for many decades, the current article advocates additional recognition of old and new natural laws as *law*, and highlights socio-cultural normative systems in particular as legal inputs. Thus, *law* becomes a complex net of constant negotiation and compromise between competing legal facts of different strengths, reflected in official legal recognition or unofficial legal presence.

Negotiating processes may lead to ‘perfect justice’, perhaps near the middle of the triangle, the arena of legal pluralism, signifying all those scenarios where no single source of law dominates to the exclusion of others.<sup>81</sup> ‘Perfect justice’ is a jurisprudence agreeable to all the people in the various interactive corners of the triangle. Menski argues that ‘perfect justice’ remains a constant challenge: the desirable equilibrium is inherently unstable.<sup>82</sup> The dynamic principle of interaction through constant renegotiation and compromise indicates that a postmodern, globality-conscious legal theory needs to be multidisciplinary and multidimensional, always conscious of multiple differences and competing claims. Such a theory can, thus, be a vehicle of sustainable regional and continental integration.

Menski developed his theory further and added a new dimension to it. In the tetrahedron shown diagrammatically in Figure 2, Menski builds globalisation into the legal structure, so that the image of the semi-autonomous plural field of law now has four corners, and takes the shape of a kite that now soars into SADC skies.<sup>83</sup> The more appealing presentation of the kite stands as shown in Figure 2.

## Menski’s Tetrahedron Theory of Law

This theory explains that globalisation is still treated as a kind of extralegal force that impacts on law, but it is not part of law. Modernism, globalisation and/or international law are thus woven into the pluralism which any legislator or law reformer should consider. Again, like its predecessor, the triangle, the tetrahedron constitutes the internally plural, semi-autonomous field of all law,

79 (ibid.:185–189, 612).

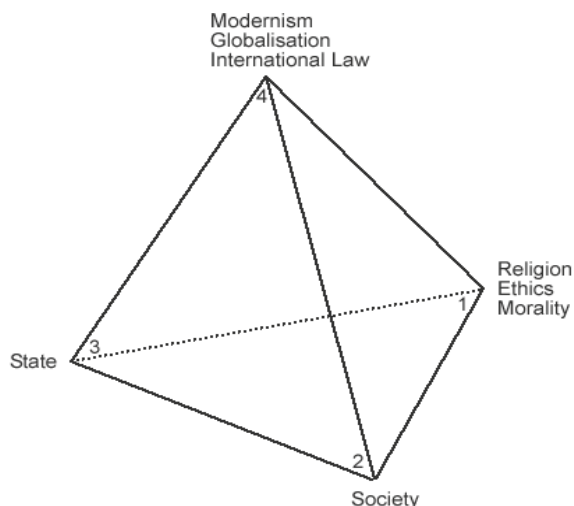
80 (ibid.:5).

81 (ibid.:186).

82 (ibid.:185).

83 (ibid.:13).





**Figure 2: Menski's Tetrahedron Theory of Law**

representing global legal realism with no single angle dominating any other. This is a workable system insofar as Africans are allergic to being preached to about international principles of law which are not adaptable to their cultural orientation. Thus, the tetrahedron model fits the once-refuted cultural relativism, which has found universal human rights principles being rejected as “monsters”<sup>84</sup> in Namibia and elsewhere.

In a more plural perspective, Menski vigorously challenges the barely hidden undercurrent of denial of African laws and their potential contributions to jurisprudence that is based on specific cultures. Borrowing from his mentor, Masaji Chiba, Menski further elaborates that African laws involve different ethnic markers or “legal postulates”.<sup>85</sup> Furthermore, incorporating Patrick Glenn’s chthonic perspective, Menski’s Africa-conscious legal theorising recognises African cultural concepts as forms of natural law.<sup>86</sup> Despite the onslaughts of modernity, African laws remain a living reality, relevant to their people – hence the resilience and huge potential for being a vehicle for African unity. Surely, doing away with everything African ‘as quickly as possible’ would disturb the process of negotiation between the four angles in this theoretical

84 See Menski, WF. 2010. “Monsters, legal pluralism and human rights in Africa”. In Hinz, MO & C Mapaire (Eds). *In search of justice and peace: Traditional and informal justice systems in Africa*. Windhoek: Namibia Scientific Society, pp 448ff.

85 Chiba (1993:203); cited in Menski (2008:613).

86 Generally, see Glen, PH. 2004. *Legal traditions of the world: A sustainable diversity of law* (Second Edition). Oxford: Oxford University Press.

model. Law minus culture cannot be good law: it ignores the factual basis of global legal pluralism and shuts the law reformer's eyes to reality. Thus, African laws are supposed to be characterised according to their own internal characteristics, and not according to imposed criteria.

Does Menski's Tetrahedron Theory of Law have any relevance to the revitalisation of African value systems for sustainable regional and continental integration? Before an attempt is made to answer this question, it should be mentioned that this theory was developed by a person seated in London wearing the goggles of legal pluralism. Furthermore, the theorist was conversant with Asian laws, and had a special interest in and had done extensive research on African laws and value systems. Against this backdrop, Menski depicts legal uniformity as a myth and global uniformisation as partial reality. The message to Africa is that the recognition or confirmation of African law in Western-styled constitutions across the African continent does not mean that law reformers should embark on harmonisation of received law with traditional laws. African lawyers should instead balance global systems with African traditional systems, but cautiously so, because simplistic arguments about returning to purely traditional African values and structures are just as illusory.

In this light, Africans should have a human-centred, participatory, bottom-up approach in African laws, based on trial and error, not on prearranged schemes brought in from foreign jurisdictions. Therefore, the position of competing perspectives implies that one cannot be forced to subscribe to one particular approach or perspective without losing global validity and the link with reality. The central task is to cultivate respect for the in-built need for negotiation around and beyond competing perspectives. Just as African law of the past was never just about custom, African laws of the future cannot just be about state-made laws or international norms. Menski's theory can be reflected in the context of some of eminent African statesmen whose African philosophical thought remains relevant,<sup>87</sup> and should be married with African philosophical thought in a way that creates unity of thinking and action for the betterment of Africa and its people.

## Conclusion

This article has attempted to show that law is not just an attribute of human corporate existence: it is also a cultural phenomenon, admitting in its trail the characteristics of cultural distinctions and pluralisms. Just as there can be competing ideologies in the same society, so there can be opposing ideologies between different societies. But, whereas African natural law exists, it has tended to be overshadowed by Western scepticism about the existence of African jurisprudence. Indeed, positivism is overwhelming in many African

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87 For example, Nkrumah's consciencism and Kaunda's humanism, as explained above.

legal discourses, but it is apparent that it is not eradicating the principles of autochthonous African law. Eurocentrism opposes Afrocentrism, and the friction can be felt across the continent in various ways. Thus, while societies with different social systems can coexist, their ideologies have to interact in an uneasy pluralism. The argument on the proper way to revitalise African value systems for sustainable integration in a globalised world of competing jurisprudential perspectives shows that there is such a thing as peaceful coexistence between states with different social and legal systems; however, as long as oppressive classes or ideologies exist, there can be no such thing as peaceful coexistence between opposing ideologies.

The Western world, once taken as a universal referent, has been depicted as a positivism-obsessed centre of cultural imperialism which cannot provide for sustainable continental and regional integration. The article has shown that Africa, as a product of colonialism and imperialistic ambition, has contributed to the loss of African values. Without dwelling on debates surrounding the effects of colonialism, the argument focused more on African traditional law and modern state law, pointing out a factual situation of intrinsic legal plurality and philosophical thought evident in all legal systems across the African continent. Borrowing from the theory of legal pluralism, the paper has shown that culture-specific African laws involve different ethnic markers. Thus, modern African legislators and law reformers should look neither East nor West, but where their feet stand: that is where African values lie, and that way, African heritage will never be lost. Against this backdrop, the paper showed how governments across southern Africa have tried to marry the received systems of law with traditional systems by reappropriating their lost dignity and incorporating the once-sidelined traditional African legal systems. The article has further showcased a theory that can provide an environment that is conducive to the revitalisation of African moral and value systems for sustainable continental and regional integration in a globalised world of competing perspectives.