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► **To cite this version:**

Leye Komolafe. African Jurisprudence as Historical Co-extension of Diffused Legal Theories. *Thought and Practice*, 2022, 8 (1), pp.51-68. 10.4314/tp.v8i1.4 . hal-03768104

HAL Id: hal-03768104

<https://hal.science/hal-03768104v1>

Submitted on 2 Sep 2022

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African Jurisprudence as Historical Co-extension of Diffused Legal Theories

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<http://dx.doi.org/10.4314/tp.v8i1.4>

*Thought and Practice: A Journal of the Philosophical Association of Kenya
(PAK)*

New Series, Vol.8 No.1, June 2022, pp.51-68

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<http://ajol.info/index.php/tp>

ISSN: 2076-7714

Abstract

African jurisprudence, like African philosophy, continues to be hotly debated. This article contends that the debate straddles the uniqueness claim which either emphasises the existence or possibility of a peculiar legal framework on the continent, and a historical co-extensional position reiterating that African jurisprudence is a continuum of other legal traditions. The article argues that there is no uniquely African jurisprudence, and that what obtains within the structures of jurisprudence on the continent also exists within various legal traditions elsewhere, and as such can at best be described as 'jurisprudence in Africa' rather than 'African jurisprudence'. It defends this thesis through analytic and comparative explications of the content of natural law theory and legal positivism as experienced on the continent. *It* concedes that relics of the colonial legal experience create contestations that inform scholars' calls for a return to traditional legal systems. It concludes that a reconstructive jurisprudence in Africa must take cognisance of the continent's historical and evolutionary legal experiences, but that a unified or monolithic theory may not be sufficient to address the choice of functional jurisprudence.

Keywords

African jurisprudence, jurisprudence in Africa, African legal evolution, diffused legal theories

Introduction

It may be conceded that the question of an African jurisprudence, that is, a unique African philosophical foundation of theoretical questions about the nature of law and legal systems in Africa, partially protrudes from the grand discourse on the existence of African philosophy. Viewed derivatively, arguments for its existence often take a stance similar to contestations on the possibility of African philosophy. The logic goes thus: if African philosophy can be debated and affirmed, then African jurisprudence may be cantilevered into the same confirmative structure emphasising the existence of African philosophy. In other words, if there is African philosophy then it should be plausible to argue that there is African jurisprudence. In its most combative form, therefore, African jurisprudence would bear semblance to the strictures of African philosophy, at least existentially. Nevertheless, methodological issues arise from this assumption, as what exactly forms the markers of such jurisprudence remains debatable. Indeed, as with the debate on the existence of African philosophy, the question arises as to whether or not a unique African jurisprudence can be defended. Would cultural nuances form the core of the development of African jurisprudence? Are such cultural nuances and contextual interpretations sufficient for the defense of a unique jurisprudence? These and several other questions remain within the boundaries of the uniqueness thesis.

I defend two theses in this paper. *First*, I argue that there is no unique African jurisprudence, and that what obtains within the structures of jurisprudence on the continent exists within various legal traditions elsewhere, and as such can at best be described as 'jurisprudence in Africa' rather than 'African jurisprudence'. I defend this thesis with analytic and comparative explications of the content of natural law theory and legal positivist theory as experienced on the continent. On the second thesis, I concede that relics of the colonial legal experience create contestations that inform scholars' call for a return to traditional legal systems. I conclude the paper by advancing the view that a reconstructive jurisprudence in Africa must take cognisance of the continent's historical and evolutionary legal

experiences. However, I point out that a unified or monolithic theory may not be sufficient to address the choice of functional jurisprudence.

The paper is divided into four sections. In the first, I attempt to re-interpret the idea of African jurisprudence as jurisprudence in Africa. A defence of this re-interpretation is provided alongside an elucidation of what such renaming portends. In the second section, I analytically explore two legal theories, namely, natural law theory and legal positivism, and highlight what they share with legal traditions on the continent. I espouse the concept of diffusion, which entails the position that the foundational questions of law and legal systems in Africa are represented in natural law theory and legal positivism to support the argument that jurisprudence in Africa is a historical co-extension of embodiments of several other legal traditions, and that as such, a thesis of a unique African jurisprudence is inappropriate. In the third section, I trace the call for a unique African jurisprudence to the effects of the colonial legal relics on the continent. In the concluding section, I detail conditions that may be necessary for further development of jurisprudence on the continent in the light of understanding African legal traditions as historically evolved, and the instructive role the recognition of diffused theories may play in such an endeavour.

African Jurisprudence or Jurisprudence in Africa? A Re-interpretive Scheme

Two approaches may be deployed to the critical reflection on the existence of African jurisprudence, and a proper identification of these is instrumental to the aim of this paper. One is what may be termed the uniqueness thesis, while the other may be called the historical extension thesis. It is within the confines of the former that propositions on a sharp distinction between African jurisprudence and what obtains in other climes and traditions are often based. On the latter view, however, jurisprudence in Africa is interpreted as existent, but not in a unique form. Rather, it is construed as an evolving or evolved tradition that reflects ingrains of existing legal theories, especially natural law theory and legal positivism.

A little defence of jurisprudence in Africa rather than African jurisprudence is imperative here. I take it that when the prefix ‘African’ is used without qualification of definite boundaries of uniqueness, it could amount to attributing ideas to particular geographical regions, which constitutes an unwarranted assertion, since no justification is provided regarding what makes it the case that the predicate it represents deserves such signification. Moreover, that one evinces the existence of a structurally verifiable mode of legal reflections that make up a legal system does not necessarily warrant fixing it within a geographical enclave as though it bears no resemblance with what exists elsewhere. Put differently, would the idea of an African jurisprudence, if it shares similar characteristics with other legal traditions, not amount to the multiplicity of entities without logical need, and would we not do well to sever this with Ockham’s razor, as it flouts the law of parsimony?

The historical coextension thesis denotes renaming the purported ‘African jurisprudence’ as ‘jurisprudence in Africa’ and categorising it as coterminous with various legal theories in other legal systems. Thus, this thesis holds that rather than interpreting or fashioning a unique jurisprudence, jurisprudence in Africa should be perceived as a part of existing legal traditions. As will be made clear in subsequent sections of this paper, there is a clash between the uniqueness and historical extension theses. I defend the historical extension thesis using the argument from diffusion.

Analytical Interpretation of Jurisprudence in Africa and the Idea of Diffused Legal Theories

My first thesis is that it would be prudent to replace the notion of African jurisprudence with that of jurisprudence in Africa. This is due to the fact that embodiments of what is construed as African jurisprudence need not take a unique identity, but should rather be seen as diffusion of existing legal theories. In particular, the diffusion of natural law theory and legal positivism is partly due to the evolution of the legal structure within Africa’s socio-political context. Natural law theory and legal positivism, being dominant legal traditions in the literature

on the philosophy of law, are relevant candidates for interrogating the foregoing assertion.

The imperative of interrogating African jurisprudence is pertinent on grounds that claims of legal peculiarity exist within research on jurisprudence in Africa. For instance, pre-colonial legal tradition in Africa is cited by Edet and Segun (2014) as distinctively imbued with socio-cultural infusions that separate African legal traditions from others. Similarly, Bewaji (2016) conceives precolonial jurisprudence as being at odds with Western legal structures, as they allegedly run parallel. We may do well to test these narratives against the backdrop of the claim of diffused legal theories espoused in this paper. A critical explication of the two dominant legal theories will thus support the claim of diffused legal theories within jurisprudence in Africa.

Proponents of natural law contend that law is dependent on morality as it has some sense of derivation from reason or transcendental authority — in this sense God. On the other hand, legal positivists hold that law rests on social fact (Hart 1994; Raz 1980). Accordingly, for legal positivists, neither morality nor transcendentalism matters in law. Thus, the bone of contention on the relationship between morality and law subsists as proponents of natural law insist that law must conform to morality, while those of legal positivism argue that law and morality are conceptually separable (Marmor 2011, 14).

Some natural law theorists' attempt to foreground law in transcendence inculcates a theocratic basis for law, while others in the tradition hold on to moral reasonableness as the determinant of law (Finnis 1980; Crowe 2019). Yet for some, it would appear that both the theocratic bend and moral reasonableness are inseparable, but one is prior to the other. In this order of primacy, transcendence — or God — takes precedence, while derivation has the validity of law only if it conforms to some sets of morality binding on the constructs of the Divine (Augustine 1998; Cicero 1928; Aquinas 1993; Fogleman 2019). These assumptions imply that the theocratic order rests on immutability, as the permanence of the divine is reiterated. The moral reasonableness thesis asserts that law is a derivation of human reason in conformity to moral standards

(Aquinas 1993; Okafor 1984, 161-162). Regardless of the dimension embraced, natural law theory emphasises the inseparability of law from morality, and it is this permanent fixation of law with morality that legal positivists vigorously contest (Marmor 2011, 6-7).

In Marcus Cicero's classical conception of natural law, "true law is right reason in agreement with nature; it is of universal application, unchanging and everlasting; it summons to duty by its commands, and averts from wrongdoing by its prohibitions" (Cicero 1928, 211). The theocratic dimension of law is expressed by Cicero with the claim that to alter the law which is laid upon humans is a sin, as not even the senate possesses such powers let alone an individual's attempt at interpreting and nullifying it. A punchier adoption of the theocratic foundation is expressed by Cicero when he says: "... there will not be different laws at Rome and at Athens, or different laws now and in the future, but one eternal and unchangeable law will be valid for all nations and all times, and there will be one master and ruler, that is, God, over us all, for he is the author of this law, its promulgator, and its enforcing judge" (Cicero 1928, 211). Thus Cicero treats law as immutable through a tripartite construct: it is derived due to its essence and purpose, it is accessible through reason or conscience, and it expresses itself through the physical world or nature (Cicero 1928, 383-385). All in all, it is the command of God.

The theocratic thrust of natural law is not alien to jurisprudence in Africa, but is actually diffused, as it has a historical moment of appraisal on the continent. John Mbiti's postulations on the integration of religion with the African existential outlook buttresses this point. For convenience, we may at least place this theocratic bend in the pre-colonial era without contradiction. This, however, does not derive its veracity from a suggestion that residues or relics of the theocratic structure are non-existent outside that historically dated period.

Mbiti says that in the African cosmology, there is no distinction between the sacred and the secular, as religion permeates all aspects of African life (Mbiti 1969, 1). Inferentially, if religion cannot be separated from the African way of life, then it must play a critical role in the construction of law in particular, and of

the jurisprudential structure in general. Furthermore, so long as morality is an indistinguishable part of African religion, then morality cannot, in this sense, be separated from law. Mbiti's thesis, if interpreted this way, supports exemplifications of natural law theory in the African context. Mesembe Edet and Samuel Segun (2014, 50) stress this further when they assert that in African religion, God gave people their moral rules of conduct and specified the form of social ordering for the sake of the community. Edet and Segun then expressly defend some tenets of traditional African jurisprudence as: the value of religion and the sacred, the value of truth and justice, the value of responsibility, and the value of high moral standards and good character (Edet and Segun 2014, 49-55). The import of Mbiti and Edet and Segun's propositions acknowledges conduits of natural law theory as it appears within Africans' understanding of law.

Thomas Aquinas modifies the classical natural law tradition as he contends that positive laws, being an ordinance of reason, are formulated through two means. The first, which he calls derivation, is a logical form, while the other, which is determination, specifies laws. By acknowledging the theocratic basis of natural law, Aquinas says "every human law is just so much to the extent that it is a part of nature and the laws governing law also. The just character is based on its being derived from the law of nature. But if in any point it deflects from the law of nature, it is no longer a law but a perversion of law. Unjust laws are acts of violence rather than laws; because ... a law that is not just, seems to be no law at all" (Aquinas 1993, 324).¹ Human positive law, for Aquinas, is a participation in the divine order or reliance on the higher order, for it is a derivation of natural law, which is in turn a derivation of divine law (Bix 2010, 211). This endeavour is towards the common good, holds Aquinas, as proportional legislation must not extend beyond the powers conferred on the lawgiver, and the law's burden must be fairly imposed on citizens (Aquinas 1993, 234-236).

Aquinas is not alone in this line of thought, as John Finnis builds on the common good in his theorisation of natural law. Finnis approaches the idea of law from the functionalist viewpoint by insisting that law exists for the resolution of co-

¹ The emphasis here is mine.

ordination problems. It is not easy to divorce Finnis's claims from collective responsibility, while recognition of the adopted scheme of resolving co-ordination problems is germane. The existence of the legal order, Finnis asserts, creates a shared interest which gives everyone moral reason to collaborate with the law's co-ordination solutions, just as the common good is the good of individuals living together for their collective well-being (Finnis 1989, 102). Finnis takes it for granted also that depending on one another for this good is inevitable (Finnis 1989, 103). Finnis further argues that "the institution of law gains much of its value, as a contribution to the common good, precisely from the fact that the obligations it imposes hold good even when breach seems likely to be undetectable" (Finnis 1980, 303-305).

Claims of diffusion are extended to the common good component of natural law theory. Let me return to this point in relation to Aquinas' and Finnis' views on the common good. Rather than a contrastive exploration of the common good and strictures of jurisprudence in Africa, a comparative analysis would fit. John Murungi clings to the communitarian thesis as a structure often appealed to in the formation of law in traditional Africa. Extracting the parlance that Africans were thoroughly communitarian, Murungi says African customary law recognises the communal connotation of being a person as fully embedded in a community, and this embeddedness in the community plays a crucial role in the construction of African jurisprudence (Murungi 2004, 522). Careful disambiguation of thoughts would reflect similarities between the common good thesis and the communitarian ideal upon which law in traditional Africa is said to be built. That this is a furtherance of my espoused diffusion thesis is defensible and aptly justified. F.U. Okafor aligns with this position with the claim that communitarianism cannot be divorced from law within pre-colonial Africa, as it is intrinsically woven into the fashioning of law in traditional Africa (Okafor 1984, 161-162).

Let us consider the view of legal positivists on these matters. Legal positivism is defended on two central theses, namely, social fact and separability. The social fact thesis denotes the reduction of law to facts observable within a polity, and for the classical legal positivist, John Austin, the existence of law as a command reiterates this. So, for Austin, a complete legal system is that imbued with the

existence of law as a sovereign's command, while the social fact component is the intimation of obedience with the threat of sanction (Austin 2004, 124). The separability thesis emphasises that as long as these conditions, namely, the existence of rules and specifications of punishment in case of non-compliance are met, morality need not be infused into jurisprudence. Austin makes the separability thesis more concrete when he says that "if I commit a crime, I shall be tried and condemned, and if I object to the sentence by claiming that it is contrary to the law of God ... the Court of Justice will demonstrate that my reasoning is inconclusive by hanging me up, in pursuance of the law which I have violated" (Austin 1954, 158).²

Legal positivists in general, and Hart in particular, agree that there are instances that prove that certain laws may coincide with morality, and consequently suggest that it is the moral underpinning that make them binding in conscience. The relevant argument, however, is that no matter how bad a law is in the view of morality, it can not lose its binding force as law. As Hart puts it, "... it does not follow that everything to which the moral vetoes of accepted morality attach is of equal importance to society; nor is there the slightest reason for thinking of morality as a seamless web: one which will fall to pieces carrying society with it, unless all its emphatic vetoes are enforced by law" (Hart 1971, 249). Hart's contrarian thought to the moral-connection thesis of natural law theory is extenuated when he argues that only three conditions (recognition, change and adjudication) make up a complete legal system; and these are embedded in the union of primary and secondary rules. The rule of recognition signifies how law gains its traction and binds citizens in obedience, and specifies the way primary rules may be conclusively ascertained, introduced, eliminated, and conclusively determined (Hart 1994, 92). The rule of change enables a society to add, remove and modify aspects of the society's valid rules, making it possible for rules to be changed within the legal system without undermining the validity of the new rules. The rule of adjudication provides foundations for determining when and whether valid rules in the system have been violated, and when law runs out, it grants legal officials certain rights to address penumbra in law (Hart 1994, 113).

² Emphasis mine.

From Austin's command theory of law to Hart's reductionist social fact constructs, legal positivism's ingrains are diffused in jurisprudence in Africa, as conceptual separation of law from morality has a similar trait in both African and non-African jurisdictions. For example, reflections of the separability thesis exist within the Yoruba legal system, as we shall see soon. While the argument here is not that the entire stretch of the continent expresses codes that are reminiscent of positivism, these embodiments are not strange to jurisprudence in Africa. Let me use a Yoruba legal space as a foil for this expression. From various proverbs which reflect the main tenets of tradition, it could be argued that the Yoruba³ conception of legal validity is reliant on the monarch's decree. In one of the most frequently used proverbs, it is said that "*ti oba lase*" a translation of which is "the law is what the king says it is" or "the king's decree is law". Austinian reflections on the law as a sovereign's command in its maximum exemplar holds that the sovereign is an individual who has the habit of enjoying obedience but who does not owe the same to anyone. That this seems to be built on the fiat of monarchy is relevant to this analogy. For interpretation purposes also, separation of morality from the law is intricately connected to this statement, I suspect, even if theoretically.

Colonial Legal Relics and Contestations on a Return to Pre-Colonial Legal Structures

Let me now address the second thesis of this paper, which implicates the colonial legal experience as the source of contestations on African jurisprudence, thereby signaling a return to traditional legal systems within the African context. If one critically explores concatenations on the history and development of jurisprudence on the continent, the veracity of this statement would be affirmed. This proposition deserves elucidation. One view is to claim that legal positivism became a major element of law within colonial Africa, and as such, runs contrary to the legal tradition of the continent. This position, put forward sharply by F.U.

³ A mono-representational denominator of the dominant ethnic groups within the stretch of Southwestern Nigeria, some part of Northcentral Nigeria, extended to the Republic of Benin, and with a sizeable presence in the Americas.

Okafor, asserts that legal positivism is alien to the African legal tradition, as it was introduced by colonialists. Okafor assumes that the African legal tradition entailed a strong moral connection thesis, which invariably made it impossible for the law to run contrary to morality, so that legal positivism in its generality is incompatible with African ontology (Okafor 1984, 157). For Okafor, the moral connection thesis within traditional African jurisprudence, and the role it played as the metaphysical and moral foundation of law in Africa, clearly marks off traditional African jurisprudence from the positivism of the colonial enterprise (Okafor 1984, 162).

It has been further argued that jurisprudence in Africa during the colonial period was largely based on the duplication of the legal systems operated in the home countries of the colonialists, and this entrenched existing legal systems in Africa at the time in a new legal system (Esiemokhai 1986, p.ix). For example, as the British system was introduced into West African colonies and the common law implemented there, customary laws which were considered to be legislated in accordance with transmitted traditions were replaced in the urban areas of colonial states, and, where full implementation was impossible, some forms of modifications were facilitated. John Murungi projects this thesis by stipulating that colonial jurisprudence in Africa was largely a jurisprudence of subjugation (Murungi 2004, 521).

While it may be true that during the colonial period the diffused legal theories were condensed, and positivism, which had become a dominant legal theory, at least within the English tradition, was strongly espoused and given a central role in British colonies, it does not follow that legal positivism was a new legal order which had hitherto never existed on the continent (Taiwo 1985, 198). Our earlier Yoruba example supports this point.

It may not be denied, however, that during the colonial era there was a structured lumping of citizens into a concretised positivistic legal regime, as embodiments of natural law and positivism were desegregated, but with a more decisive concentration on the latter. It is as a result of this desegregation that a post-colonial critique of the colonial legal enterprise presumes that a rupturing of

positivism in its entirety might be the right approach to fashioning an alternative jurisprudence on the continent (Idowu 2005, 181).

Yet, it may be emphasised that the rupturing of jurisprudence in Africa, and a penchant for developing a unique African jurisprudence, is exacerbated by the colonial legal experience, just as it is presumed that jettisoning the relics of the legal structures of the colonial period would best serve the interests of jurisprudence on the continent (Idowu 2005; Okafo 2006). Pandering towards this line of reasoning, Nonso Okafo attempts to situate jurisprudence in Africa within the uniqueness thesis, but implicitly explicates the diffusion thesis without acknowledgment. Okafo picks the legal contexts of some ethnic groups in present-day Nigeria as exemplars. In his words, “law in traditional Africa includes enforceable traditions, customs, and laws. The term covers the expressed commands of political sovereigns or superiors, such as the Eze in Igbo, the Alaafin in Yoruba, and the Tor in Tiv and other kings, chiefs, and titleholders in African societies.” This expression, which resonates with Austin’s command theory of law is what Okafo considers to be distinct from what he calls the Western idea of law. Similarly, Okafo expresses the social fact thesis in his normative conception of law. Okafo asserts that “apart from the expressed commands, there are implied do’s and don’ts contained in each society’s body of traditions passed down from one generation to another as well as customs in contemporary use in each society” (Okafo 2006, 42).

Perhaps it is on the basis of the above logic that F.U. Okafor also takes it for granted that the distinction made between law in traditional African society and Africa’s legal experience of positivism is sufficient for emphasising the uniqueness of African jurisprudence. This attempt by Okafor at bifurcating jurisprudence in traditional Africa with its moral-connection from positivism, nevertheless, appears to be a conscious effort; and when matters are thus bifurcated, overlapping and evolutionary signifiers of resemblances will invariably be expunged. Okafor added further assumptions to the espousal of the uniqueness thesis, as he hastily avered that within traditional Africa, law served the purpose of restitution and not retribution; and as Okafor would argue, positivism favours retribution. On the one hand, Okafor presumes that all the

content of legal positivism aims at retribution, just as he seems to perceive traditional African law as either incapable of retribution, or that it was never part of the consideration of jurisprudence. Some of Okafor's points, cautiously criticised by Olufemi Taiwo as based on myths and lacking in factual representation as well as over generalised (Taiwo 1985, 198-199), are part of what we may call an attempt at eliminative legal otherness; and this is an attempt at repudiating the historical evolution of jurisprudence in Africa, and a subtle denial of the diffused manifestations of both natural law theory and legal positivism within the African legal tradition. On the contrary, the argument so far has reiterated this diffusion.

Conclusion

Earlier in this discourse, I subjected the phrase 'African Jurisprudence' to scrutiny, and purposely dropped the prefix 'African' for its ambiguity and because of the possibility of its attributing thought to particular regions. The relevance of that exercise is relevant to my concluding remarks, as the alleged imperative to develop or re-emphasise a unique African jurisprudence continues to gain traction on the grounds that it would best serve the interest of Africans. Nonso Okafo insists on a backward-looking approach to the context of traditional Africa for inspiration. For Okafo, this is plausible because "in an African society, the Native African ideas and models are superior to their Western and other non-Native counterparts. The Native African ideas and models should therefore be preferred, strengthened, advanced, and promoted for many reasons" (Okafo 2006, 56).

John Murungi also agrees that African jurisprudence is a possibility, but it can only be meaningful within historical context (Murungi 2004, 521). Murungi explains that this is to be conceptualised in terms of taking cognisance of the past and ensuring that there is continuous exchange of thoughts on the very idea of law and the broader notion of jurisprudence. To buttress this, Murungi asserts that "what African jurisprudence calls for is an ongoing dialogue among Africans on being human, a dialogue that of necessity leads to a dialogue with other human beings" (Murungi 2004, 525). Murungi's proposition is instructive for the recognition of historical evolution of legal theories on the continent, but it has a

foundational problem because he already sets the tone of peculiarity as the basis of the dialogue on African jurisprudence by asserting that there is an African-ness of African jurisprudence (Murungi 2004, 525-526). Also, M. Mwalimu's belief is that there exists a paramount need for developing an African jurisprudence that is suitable for the unique African developmental situation on grounds of socio-legal background of developing African nations, and that this calls for a responsive legal system with more of a functional character than of an analytical nature (Mwalimu 1986, 40).

I aver that a drive for a functional jurisprudence does not make a singular proposal for the continent apt, for even if there is a need for an overhaul of the current philosophical foundation of law in some contexts on the continent, it need not be accompanied by the thesis of a return to an assumed African past devoid of elements of positivism; and so long as the fundamental ground on which the claim of constructing a new jurisprudence on the continent is historical purity or essentialism, it would be wrongheaded, as claims of peculiarity are existentially unfounded. The exposition of diffusion of legal theories within jurisprudence in Africa supports this claim of non-peculiarity. Indeed, to presume peculiarity would be tantamount to denying the historical exemplification of these theories.

If necessary, negative influences from the colonial experience may be exorcised from the contemporary legal formation on the continent, but neither a bifurcation of legal theories nor essentialist presuppositions about the law would play that role effectively. Legal traditions in Africa are a composite experience of various theories, and these theories were diffused within traditional Africa. That natural law theory and legal positivism had been concretised as separate entities during the colonial era does not necessarily warrant a rejection of one theory for the other on grounds of it having evolved from a particular geographical order, in this case the West. The conclusion of this paper, however, is that a functional jurisprudence on the continent should pay attention to the diffusion of existing legal theories, and harness the strength of whichever is considered most practicable in particular jurisdictions. This is due to the fact that no single theory of law would be appropriate for any generalisation.

Consequently, African legal traditions, like any other, have been shaped by complex existential frameworks whose foundations are perpetually debated and contested. The diffused legal theories of precolonial Africa, colonial Africa, and reflections on relics of these combined periods in the contemporary jurisprudence on the continent, make it doubtful that any legal tradition would possess any form of uniqueness in its approach.

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